LEGAL LIABILITY TO PAY COMPENSATION FOR THE DESTRUCTION OF FOREIGN AIRCRAFT FOR AERIAL INTRUSIONS IN PEACE TIME

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A Thesis Submitted to

The Faculty of

The National Law Center

of the George Washington University
in partial satisfaction of the requirements
for the degree of Master of Laws

September 30, 1989

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Contents

I. Introduction

Professor Diederiks-Verschoor defines air law as a body of rules governing the use of airspace and its benefits for aviation, the general public and the nations of the world. Furthermore, she asserts this body of rules consists of approximately six classifications:

(1) multilateral conventions;
(2) bilateral agreements;
(3) national law;
(4) contracts between states and airline companies;
(5) contracts between airline companies;
(6) general principles of international law.[1]

The primary focus of this study will be on general principles of international law as a source of public international air law, as opposed to private international air law, in determining the status and treatment which must be afforded military and civilian aircraft which enter the airspace of a foreign country without permission from the overflown state.

Civilian aircraft engaged in air transport are distinguished between scheduled and non-scheduled flights. They differ, in part, in that the latter does not follow a published timetable and is not engaged in regular air services.[2] On March 28, 1952, the International Civil Aviation

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[1] DIEDERIKS-VERSCHOOR, I.H., AN INTRODUCTION TO AIR LAW, 1-3 (1988).

[2] ICAO Doc. 7278-C/841 (May 10, 1952), Definition of a Scheduled International Air Service.

Organization (ICAO) Council adopted the following definition of scheduled international services:

> A scheduled international air service is a series of flights that possess all the following characteristics:
> a. it passes through the airspace over the territory of more than one State;
> b. it is performed by aircraft for the transport of passengers, mail or cargo for remuneration, in such a manner that each flight is open to use by members of the public;
> c. it is operated so as to serve traffic between the same two or more points, either
> 1. according to a published timetable, or
> 2. with flights so regular or frequent that they constitute a recognizable systematic series.[3]

This important distinction is noted because theoretically the publication of routine timetables and the use of well-known routes should enhance the safety of civilian aircraft engaged in scheduled flights. Unfortunately, as will be discussed, this has not always been the case. International attempts to regulate the conduct of states in protecting their airspace and by means of that regulation ensure the safety of the flying public have generally been successful, but when those attempts have failed the results have been tragic. Since 1952 seven regularly scheduled civilian airliners have been attacked after unauthorized intrusions into controlled airspace. Each of these incidents resulted in the death or injury of many if not all of the passengers and crew aboard.

The United States as the world's largest air carrier has a vested interest in securing the safety of the skies for air

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[3] Id.

transportation of passengers and cargo. Understandably, therefore, the United States has taken an active leadership role in attempting to establish standards which should govern the treatment of aerial intruders. Unfortunately, as a result of what some may view as friendly bias on the part of the United States towards allies and outright hostility towards political adversaries, the rule of law the United States has sought to reinforce has arguably suffered, resulting in what may be considered a decrease in safety to the overall flying public.

The principle that every state has complete and exclusive sovereignty over the airspace above its territory is an accepted customary rule of international law.[4] William Hughes asserts that the "explicit recognition of the principle found in Article 1 of the Paris Convention of 1919, and the Chicago Convention of 1944 was, therefore, merely declaratory of existing customary law on the subject."[5] Furthermore, Professor J.C. Cooper is quoted as asserting that this claim to sovereignty is based on the "sole unilateral right to control all flight in the airspace above its land and waters," and is "subject to no qualifications other than those to which

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[4] Lissitzyn, O., The Treatment of Aerial Intruders in Recent Practice and International Law, 47 Am. J. Int'l. L., at 559 (1953).

[5] Hughes, W., Aerial Intrusions by Civil Airliners and the Use of Force, 45 Journal of Air Law and Commerce, at 595 (1980).

it voluntarily agrees."[6]

It would seem evident from this principle, that normally no aircraft would be entitled to enter a foreign state's airspace without that state's permission. However, as mentioned previously, this in turn leads to the question of what status or treatment should be afforded an aircraft which enters a state's territory without that permission. Does international law give the territorial sovereign an unfettered license to defend its territory as it pleases, including the destruction of civilian or military aircraft that unintentionally intrude into its airspace? Or does it impose certain restraints upon the territorial sovereign which require it to refrain from using force against civilian or military aerial intruders in peace time?[7]

It is submitted that an examination of prior incidents involving the use of force against military and civil aerial intruders as well as the resolution of the disputes arising therefrom will support the inference that a customary norm exists which prohibits the use of force against civil aerial intruders and, in certain instances, military aircraft. It is, however, ironic that the Soviet Union, the state responsible for 42% of the attacks on scheduled flights in peace time, is

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[6] Id. at 596.

[7] Morgan, The Shooting of Korean Air Lines Flight 007: Responses to Unauthorized Aerial Intrusions, in INTERNATIONAL INCIDENTS, 202-237 (REISMAN AND WILLARD, 1988).

the one state that has consistently failed to comply with what, arguably, has developed into a customary norm.[8]

The vituperative exchanges between governments that have erupted following the destruction of an Israeli El Al flight (AX-AKC), a Korean Air Lines flight (KAL 007), an Iranian Air Lines flight (Iran Air 655) and others represent long standing disputes over ideological differences, foreign policy and various other issues that states view as in their self-interest. However, these types of exchanges tend to obscure the international legal issues surrounding each tragedy. Although these exchanges indicate a certain partisan bias may contribute to the likelihood of a particular state resorting to force as a result of an aerial intrusion into its territory.

The critical issues with which this paper is concerned are: (1) the international obligations of a state to apologize and pay compensation for the downing of civilian aircraft engaged in providing regular air transportation for the flying public even if the overflown state acknowledges no fault; and (2) the role of the United States in establishing the rule of law as it applies to aerial intruders. The examination of these issues requires a review of conventional and customary law to determine if an international cause of action exists against a state that destroys or attacks an intruding foreign

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[8] Id.

aircraft. It should be noted that although the payment of compensation can not palliate any of these tragedies, it serves as a demonstration of a state's willingness to accept its international responsibilities in addition to providing financial support for the families of the victims.

II. Civil Aerial Intrusions

In order to be accepted as customary international law, a norm must satisfy primarily two criteria: (1) consistency over time of a general practice of states, and (2) acceptance of the practice as law or opinio juris.[9] The following incidents may be considered as examples of generally accepted state practice, as well as evidence of opinio juris concerning the use of force by territorial sovereigns against intruding civilian airliners.[10]

A. Soviet Attack on French Airliner

The first incident took place on April 29, 1952, when an Air France airliner on a scheduled flight from Frankfurt to Berlin was attacked by Soviet fighters. The attack resulted in injuries to several passengers and a crew member. French reports claimed the attack occurred inside the Berlin

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[9] See BRIERLY, J., THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE, 56-78 (6th ed. 1963).

[10] Statute of the International Court of Justice, Art. 38 1 (b), reprinted in DOCUMENTARY SUPPLEMENT TO CASES AND MATERIALS ON THE INTERNATIONAL LEGAL SYSTEM, at 32 (SWEENEY, OLIVER, AND LEECH, 1981), hereinafter ICJ Statute.

Corridor. The Soviets claimed the airliner violated East German airspace and refused to comply with orders to land.[11]

The reactions by the West did not focus on the factual dispute, but rather centered on the right of the Soviet Union to use force against a civilian airliner.[12] The Allied High Commissioners in Germany in a joint protest made the following statement: "Quite apart from these questions of fact, to fire, in any circumstances, even by way of warning, on an unarmed aircraft in time of peace, wherever that aircraft may be, is entirely inadmissible, and contrary to all standards of civilized behavior."[13] The Allied High Commissioners and the British, American, and French Commandants in Berlin requested the Soviet Union to immediately investigate the incident, punish those responsible, and make reparations for personal injuries and property damage.[14]

The Soviets responded by issuing a strong protest to the actions of the French airliner. It maintained the airliner had violated Soviet-controlled airspace, Soviet air regulations, and had refused to obey orders to land.[15] Furthermore, the Soviets contended the shots fired by the fighter were intended

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[11] KEESINGS CONTEMPORARY ARCHIVES 12190 (1952).

[12] Hughes, supra note 5, at 601.

[13] Lissitzyn, supra note 4, at 574.

[14] Hughes, supra note 5, at 601.

[15] Id.

as a warning and were not meant to down the plane.[16] It would appear from this incident that as early as 1952 there was an expectation that force would not be used against civilian aircraft in peace time, and the use of such force would obligate the offending state to pay compensation. It would also appear that even as this norm was emerging the Soviet Union let the world know it would not tolerate violations of its airspace by civilian airliners, accidentally or otherwise. It clearly stated that lethal force would be used against any aircraft that refused to obey instructions to land.[17]

B. Chinese Attack on British Cathay Pacific Airliner

On July 23, 1954, a British Cathay Pacific airliner on a scheduled flight from Bangkok to Hong Kong was shot down ten miles east of the international air corridor off Hainan Island by fighters of the People's Republic of China.[18] Six of the ten passengers and four members of the crew were killed.[19] The airliner's pilot stated the Chinese fighters attacked without warning and "shot to kill," aiming at the fuel tanks.[20]

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[16] Id.

[17] Phelps, J., Aerial Intrusions by Civil and Military Aircraft in Time of Peace, 107 Mil. L. Rev. at 278 (1985).

[18] N.Y. Times, July 24, 1954, at 1, col. 1.

[19] Id.

[20] London Times, July 24, 1954, at 6.

The international community condemned the use of force against the civilian airliner.[21] The United Kingdom and the United States demanded that the People's Republic of China pay compensation for injury to persons and property.[22]

The Chinese, in a diplomatic note, accepted responsibility for the incident and reported they had mistaken the airliner for a National Chinese military aircraft on a mission to raid their military base at Port Yulin.[23] They stated "the occurrence of this unfortunate accident was entirely accidental." In addition to their apology they agreed to pay compensation for the loss of life and damage to property.[24]

C. Bulgarian Attack on Israeli El Al Airliner

One of the most well-known incidents involving the use of force against an intruding civilian aircraft on a scheduled flight occurred on July 27, 1955.[25] Israeli El Al flight number AX-AKC, enroute from London to Israel via Paris and Vienna, was shot down by Bulgarian fighters near the Greco-Bulgarian border when it strayed into Bulgarian airspace.[26] Everyone on board the airliner was killed. The passengers in the aircraft

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[21] Hughes, supra note 5, at 602.

[22] Id.

[23] KEESINGS CONTEMPORARY ARCHIVES 13733 (1954).

[24] Id.

[25] KEESINGS CONTEMPORARY ARCHIVES 14359 (1955).

[26] Id.

were various foreign nationals including British, Canadians, South African, American, French, and Swedish. The death toll was fifty-one passengers and seven crew members. The pilot of AX-AKC and three of the passengers were British citizens.[27]

Israel appointed a six member Commission of Inquiry to enquire into the circumstances of the downing of AX-AKC shortly after it became aware of the disaster on July 27, 1955. The Bulgarian Legation in Israel was requested to issue entry visas to the Commission members but permission was denied.[28] However, after an Israeli protest Bulgaria granted permission for three members of the Commission to examine the wreckage and take photos, but they were not allowed to interview witnesses or remain in Bulgaria beyond the daylight hours of one day, including transportation to and from the sight, which in effect limited the actual investigation to about seven hours.[29]

On July 28, the Bulgarian government issued a statement claiming that anti-aircraft defenses opened fire on the plane because they were unable to identify it.[30] They expressed deep regret and indicated they would pay their "share of the

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[27] See Memorial of the United Kingdom (U.K. v. Bulgaria), 1959 ICJ Pleadings (Aerial Incident of July, 1955) 34-37.

[28] London Times, July 30, 1955, at 6e,f.

[29] See Memorial of Israel (Israel v. Bulgaria), 1959 ICJ Pleadings (Aerial Incident of July, 1955) at 54.

[30] Supra note 25.

material damage" for the downing of the aircraft. The American response expressed "indignation" at the loss of life, including 9 American citizens, but announced it would delay sending a formal protest until a more definitive report was made available on the facts surrounding the crash.[31] The Israelis expressed anger over Bulgaria's failure to provide immediate information on the crash and entry permits to the Israeli investigating team.[32]

The United States issued a protest on August 2, 1955 which stated:

> The United States Government protests emphatically against the brutal action of Bulgarian military personnel on July 27, 1955, in firing upon a commercial aircraft of the El Al Israel Airlines, which was lawfully engaged as an international carrier. This attack, which resulted in the destruction of the aircraft and the death of all personnel aboard, including several United States citizens, constitutes a grave violation of accepted principles of international law. The Bulgarian Government has acknowledged responsibility for this action.
>
> The United States Government demands that the Bulgarian Government (1) take all appropriate measures to prevent a recurrence of incidents of this nature and inform the United States Government concerning these measures; (2) punish all persons responsible for this incident; and (3) provide prompt and adequate compensation to the United States Government for the families of the United States citizens killed in this attack.

The following Note from the Bulgarian Government issued

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[31] London Times, July 29, 1955 at 8b. The newspaper account of 13 Americans killed is inaccurate. Annex 3 of the Israeli Memorial filed against Bulgaria lists 3 persons as United States citizens who are not listed as such by the United States Memorial filed against Bulgaria. There were 13 American claimants, although there were only 9 Americans killed on the flight.

[32] Id.

in response to the United States' protest provides a revision of the facts presented by Bulgaria in its statement of July 28, 1955, which asserted the airliner was shot down by anti-aircraft defense forces:

> The Ministry of Foreign Affairs of the Peoples' Republic of Bulgaria presents its compliments to the Legation of Switzerland at Sofia and, in reply to its aide-memoire of August 2, 1955, and in compliance with the instructions of its Government, has the honor to request the Legation to be good enough to transmit the following to the Government of the United States of America:
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> The investigation carried out by the special governmental commission has irrefutably determined the following:
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> On July 27, 1955, at 7:10 local time the aircraft of the Israeli Airline El-Al entered Bulgarian air space in the area of the town of Trn without any warning. After having penetrated a distance of 40 kilometers, the aircraft overflew the towns of Breznik, Fadomir, Stanke Dimitrov, Blagoevgrad, and continued on its course in a southerly direction. It flew over Bulgarian territory for approximately 200 kilometers.
>
> South of the town of Stanke Kimitrov the aircraft was intercepted by two Bulgarian fighter planes which received orders to force it to land at a Bulgarian airport.
>
> The fighter planes warned the aircraft, in accordance with international regulations, to land. In spite of this, it did not obey but continued to fly in a southerly direction in an attempt to escape across the Bulgarian-Greek frontier.
>
> In these circumstances, the two fighter planes of the Bulgarian anti-aircraft defense of this area, astonished by the behavior of the aircraft, opened fire, as a result of which it caught fire shortly thereafter and crashed in the area of the town of Petric.
>
> Adopting the conclusions of the special governmental commission responsible for the investigation of the case, the Bulgarian Government admits that the causes of the unfortunate accident suffered by the El-Al aircraft may be summarized as follows:
>
> 1. The aircraft departed from its route, violated the frontier of the Bulgarian State and without any warning penetrated deeply into the interior of Bulgarian air space. Equipped with the most modern aerial navigating instruments, it could not have failed to be aware of the fact that it had violated Bulgarian air space. Even after having been warned, it did not obey but continued to fly towards the south in the direction of the Bulgarian-Greek

frontier;

2. The Bulgarian anti-aircraft defense units manifested a certain haste and did not take all the steps required to force the aircraft to obey and to land.

3. The Bulgarian Government likewise considers it necessary to point out the fact that over a period of many years, not respecting the sovereignty of the Peoples' Republic of Bulgaria, certain elements have allowed themselves systematically to violate the Bulgarian frontier. During recent years numerous illegal flights over the Bulgarian frontier by aircraft of undetermined nationality have been noted in Bulgaria. During these illegal flights, diversionists have been parachuted into Bulgarian territory, equipped with arms, radios and other equipment. The Government of the Peoples' Republic of Bulgaria has protested on several occasions to the Secretariat of the United Nations Organization, but unfortunately without result. All this created and atmosphere of tension which required steps to be taken to safeguard the security of the State. It was in such an atmosphere of tension that the unfortunate accident to the Israeli plane became possible.

The Bulgarian Government and people express once again their profound regret for this great disaster which has caused the death of completely innocent people. The Bulgarian Government ardently desires that such incidents should never happen again. It will cause to be identified and punished those guilty of causing the catastrophe to the Israeli plane and will take all the necessary steps to insure that such catastrophes are not repeated on Bulgarian territory.

The Bulgarian Government sympathizes deeply with the relatives of the victims and is prepared to assume responsibility for compensation due to their families, as well as its share of compensation for material damage incurred.

It would appear from a comparison of both Notes that in spite of Bulgaria's claim of trespass against the airliner it accepted the United States' position that it was a violation of international law to shoot down a civilian airliner causing, as the Bulgarians stated, "the death of completely innocent people." Furthermore, Bulgaria acknowledged its responsibility to punish the responsible individuals and pay

compensation to the families of the victims. The Bulgarian Note was a well crafted expression of regret and it succinctly stated what this author believes to have been the emerging customary norm of the day. That is that the overflown state must provide: (1) a detailed account of the circumstances surrounding the downing of a civilian airliner, (2) an apology with assurances steps will be taken to prevent a reoccurrence, and (3) the payment of compensation to the victims. Unfortunately, subsequent delays in Bulgaria's fulfillment of its acknowledged responsibilities left it open to charges that the statement had more to do with Bulgaria's attempt to gain admittance to the United Nations after several unsuccessful tries than it did Bulgaria's sense of legal or moral obligation.[33]

On August 15, 1955 the Government of Bulgaria stated that it hoped the Israeli Commission's report would be objective and that its "publication would not aggravate the situation."[34] On September 15, 1955, another diplomatic exchange took place between Israel and Bulgaria in which the Minister of Bulgaria to Israel indicated he hoped the incident would not affect Israel's favorable attitude regarding Bulgaria's admission to the United Nations.[35]

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[33] See Memorial of United States (U.S. v. Bulgaria), 1959 ICJ Pleadings (Aerial Incident of July, 1955) at 194.

[34] Supra note 29, at 61.

[35] Id.

During the course of negotiations between Israel and Bulgaria, Bulgarian officials refused to release logs, witness reports and instrumentation contained in the wreckage. They indicated the claims concerning losses to individuals seemed reasonable but the claim in respect of the property loss for AX-AKC was exaggerated.[36] Furthermore, Bulgaria stated it could not finalize its conclusions concerning claims as long as the American claim had not been submitted.[37]

On August 22, 1956 the United States presented a claim for $257,875 for losses arising from the plane incident. It should be noted that the United States communications with Bulgaria were made through the Legation of Switzerland at Sofia, since the United States was not maintaining diplomatic relations with Bulgaria at the time of the incident.[38]

A year later, on August 8, 1957, the Swiss Government conveyed to the United States the Bulgarian reply, an offer to make an ex gratia payment of 56,000 levas to the families of the victims. A similar offer was made to Great Britain and Israel.[39]

This decision by Bulgaria to disavow any legal liability for the incident and in place thereof offer instead to make

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[36] Id. at 69.

[37] Id.

[38] WHITEMAN, M., DIGEST OF INTERNATIONAL LAW, vol. 8, at 893 (1967).

[39] Id.

ex gratia payments to the families of the victims was without any official explanation.[40] Nevertheless, the United States made a convincing argument that Bulgaria's original admission of responsibility was a ploy to gain acceptance in the United Nations and having accomplished that objective, now the government of Bulgaria was going back on its word to pay adequate compensation based on its previous admission of responsibility.[41] In response to this shift, the United States, United Kingdom, and Israeli governments submitted applications to the International Court of Justice (ICJ) instituting proceedings against Bulgaria.[42] Israel's indignation at the Bulgarian reversal of policy concerning the destruction of AX-AKC is graphically illustrated in paragraph 63 of its Memorial (a pleading before the ICJ which sets forth a case including facts, law and submissions)[43] which refers to the aircraft as being "callously clawed out of the sky and destroyed."[44] Arguably, the Memorials submitted to the ICJ are a public record of the opinio juris of these states on the

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[40] Supra note 33, at 194-196.

[41] Id.

[42] See Memorial of the United States (U.S. v. Bulgaria), 1959 ICJ Pleadings (Aerial Incident of July, 1955) 22-24; Memorial of the United Kingdom (U.K. v. Bulgaria), 1959 ICJ Pleadings (Aerial Incident of July, 1955) 34-37; Memorial of Israel (Israel v. Bulgaria), 1959 ICJ 5-7.

[43] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED

[44] Supra note 29, at 85.

legally binding requirement to refrain from using force against civilian aircraft, and the necessity of paying compensation when that requirement is breached.[45]

The legal arguments in the Memorials supporting the proposition that the use of force against a civilian airliner was illegal under international law, relied primarily on the principles enunciated in the Corfu Channel Case.[46] In Corfu Channel, the government of Albania had mined the portion of the international strait that was within its territorial waters. The mining occurred in peace time and was done without warnings being published to any other governments. Two British destroyers were damaged while sailing through the Channel. The ICJ held Albania was under a duty to warn vessels of the presence of the mine field. This obligation was based on "certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than war."[47] The case was also cited as evidence that international law condemns actions by states that unnecessarily or recklessly endanger the lives of nationals of other states.[48]

In addition to the Corfu Channel Case, the United States

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[45] Id.

[46] Corfu Channel Case, (1949) ICJ, Reports of Judgments, Advisory Opinions and Orders, at 1.

[47] Id. at 12 and 22.

[48] Supra note 42, at 214.

and British Memorials relied on the International Arbitration Award Case of Garcia v. United States to support their respective positions.[49] In Garcia, a U.S. Army officer on border patrol fired a warning shot at a raft which had crossed the Rio Grande River from Mexico to America and was starting its return journey. A child on the raft was killed. The Commission held that the officer's action was a violation of international law. The decision stated, in part, that the act of firing weapons by border guards could only be justified if four requirements were met: (1) the offense was articulable by the offended state; (2) the importance of preventing or repressing the offensive behavior by the use of force was in reasonable proportion to the danger arising from it to the lives of the culprits and other persons in their neighborhood; (3) no other practicable way of preventing or repressing the offensive behavior was available; (4) it was done with sufficient precaution not to create unnecessary danger, unless the intent was to hit, wound or kill.

The Memorial of the United Kingdom categorically rejected the right to use force against civil airliners:

> The Government of the United Kingdom submits that there can be no justification in international law for the destruction, by a State using armed force, of a civil aircraft, clearly identifiable as such, which is on a scheduled passenger flight, even if that aircraft enters; without previous authorization, the airspace of the

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[49] Garcia Case (Mexico v. United States), 4 R. Int'l. Arb. Awards 119 (1928).

territory of that State.[50]

The Memorial also submitted that the use of armed force against a civil airliner could not be justified as a legitimate exercise of self-defense under article 51 of the United Nations Charter (UN Charter).[51]

The United States argued that the issue of the legality of the use of force in this situation could only arise if the offended state was able to raise an "articulable security necessity," which Bulgaria did not claim.[52] Israel's position was similar and went on to note that once Bulgaria decided to use force against the airliner, it was required to consider the "elementary obligations of humanity" and refrain from using any force greater than what was commensurate with the gravity of the threat, if any.[53]

The Garcia case as applied to aerial intrusions would seem to indicate that mere violations of territorial boundaries are insufficient to justify the use of lethal force.[54] The territorial sovereign must engage in a balancing test that weighs its security interests against the lives of those threatened, after alternatives to the use of force are

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[50] Supra note 42, at 358.

[51] Id.

[52] Supra note 33, at 210.

[53] Supra note 29, at 89.

[54] Phelps, supra note 17, at 286.

considered. But the validity of these arguments was never adjudicated, since the ICJ was compelled to dismiss the case on jurisdictional grounds. Nevertheless, in June of 1963, Bulgaria compensated Israel for the loss of life and the property damage occasioned by the incident (the maximum allowable under the Warsaw Convention limiting liability for harm in international air transport).[55]

D. Israeli Attack on Libyan Airliner

The next serious incident involving an aerial intrusion by a civilian airliner on a scheduled flight occurred on February 21, 1973, when a Libyan airliner was shot down by Israeli fighters over Egyptian territory under Israeli military occupation. The airliner was attempting to return to Egypt when it was shot down about 12 miles or 1 minute flying time from the Suez Canal.[56] The airliner was on a scheduled flight between Tripoli, Libya and Cairo, Egypt when it strayed off course. It entered the airspace of the Israeli-occupied Sinai Peninsula and flew over military installations along the canal. The plane failed to respond to attempts to contact it by radio. Israeli phantom jets instructed the plane to land in accordance with the international regulations and fired warning shots when the plane failed to comply. The plane's

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[55] LOWENFELD, A., AVIATION LAW, 2-13 (2nd. ed. 1981).

[56] London Times, Feb. 22, 1973 at 1.

continued failure to respond resulted in its being shot down.[57] 106 out of the 113 passengers traveling on the airliner were killed in the crash landing,[58]and two more died of their injuries at a later date.[59] Most of the passengers were Egyptians and Libyans and five of the nine crew members were French. There was also one American victim whose body was returned to the United States on February 28, 1973.

Egypt produced tapes of the Libyan airliner's conversation with Egyptian air traffic controllers. The French pilot who lost his life in the attack, informed the Cairo control tower, just prior to the attack, that he had lost his way due to instrument failure. He thought he was over Egypt and was being followed by Egyptian MIGs.[60] The Egyptian aeronautics director, Capt. Hassan Selim, told a news conference that heavy cumulonimbus clouds were over Egypt at the time of the tragedy. He indicated that the clouds cause heavy static that can interfere with a plane's navigational instruments.[61] The rescue helicopter dispatched to aid the wounded was also prevented from taking off for more than 2 hours by a blinding sandstorm.

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[57] Id.

[58] Id.

[59] FACTS ON FILE at 136 (1973).

[60] New York Times, Feb. 22, 1973, at 1, col. 8; id. at 12, col. 7; id. Feb. 23, 1973, at 1, col. 5,6.; id. Feb. 24, 1973, at 1, col. 7; id. Feb. 25, 1973, at 3, col. 1; id. Feb. 26, 1973, at 9, col. 1.

[61] Id.

1. Israeli Response

Israel stated its attack was designed to force the aircraft to land; they did not intend to destroy it,[62] even though the plane was believed to be on a spy mission.

The Libyan co-pilot who survived the crash verified the Israeli account of warning signals being given, however, he stated the French pilot of the airliner decided to try and "get away" because of the hostile relations between the two countries, Libya and Israel.[63] The two Israeli pilots involved in the interception also appeared at a news conference to present their version of the encounter.[64]

Defense Minister Moshe Dayan defended the actions of the Israeli pilots at a news conference on February 22, 1973. His rationale was that even though there was no evidence indicating the plane was endangering Israeli security, the pilot's failure to heed warnings suggested "hostile intentions." Furthermore, he opined that Israel should not compensate the families of the victims because that would imply guilt.[65]

The policy implications of Dayan's statement were ominous. His statement implied that civilian airliners, and therefore

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[62] Id.

[63] Supra note 59, at 307.

[64] Id. at 160.

[65] Id.

the passengers on board, somehow became "fair game" if their pilots refused to comply with instructions to land from the overflown state. The only other country that has publicly echoed such a sentiment is the Soviet Union. However, this is clearly not the position taken by Israel in 1955 when AX-AKC was shot down over Bulgarian territory. Fortunately, on February 25, 1973 the Israeli Cabinet disregarded Dayan's suggestion and announced it would pay compensation to the families of the victims voluntarily "in deference to humanitarian considerations."[66] On March 6, 1973 Israel announced it would pay $30,000 to the families of each victim and between $10,000 and $30,000 to each of the individuals injured in the disaster.[67]

2. International Response

The Arab states were outraged. Libya denounced Israel for committing a "criminal act."[68] The Tunisian President condemned the incident as a type of "terrorism."[69] Syria called it "overt piracy and a terrible massacre."[70] Egypt described the incident as "a monstrous and savage crime which is full of perfidy and which is not only a violation of international law but of all

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[66] Id.

[67] Id. at 179.

[68] Id.

[69] Id.

[70] Supra note 59, at 160.

human values."[71]

The Soviet Union asserted that the United States' "military, economic and political support" of Israel had induced Israel to commit these "new crimes and new acts of aggression."[72]

The United States sent messages of condolence to Libya and Egypt on February 21, 1973. The message contained no condemnation of Israel. On February 22, 1973 demonstrators in Tripoli broke windows of the United States embassy and burned the American flag as a protest against the destruction of the aircraft.

The United Nations Commission on Human Rights denounced Israel's downing of the airliner. The International Federation of Air Line Pilots Associations (IFALPA) called for an investigation of the incident and stated it could not find any "justification for the excessive use of force applied by the Israeli authorities." However, no action was taken to penalize Israel.[73]

During the 19th session (extraordinary) of the ICAO held between February 27 and March 3 (1973), the ICAO adopted a resolution in which the two preambular paragraphs are as follows: " (1) Condemning the Israeli action which resulted

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[71] Id. at 7.

[72] London Times, Dec. 23, 1973 at 17.

[73] Id. at 16.

in the loss of 106 innocent lives, (2) Convinced that this action affects and jeopardizes the safety of international civil aviation and therefore emphasizing the urgency of undertaking an immediate investigation of the said action."[74]

The United States attempted to have the first preambular paragraph changed to read "Deploring" vice "Condemning," but the motion was rejected, and the United States voted with the majority in adopting the resolution.[75]Betty C. Dillon, United States Representative to the ICAO made the following statement after the vote:

> The United States is opposed to the condemnatory language of the ... preambular paragraph which is inconsistent with the operative paragraphs in the resolution which call for investigation, which is the proper role and proper business of ICAO.
>
> In voting for this resolution, the United States wishes to make clear that we do not interpret it as prejudging the outcome of such an investigation.
>
> We nevertheless reluctantly voted for the resolution as a whole because we wish to join with others in calling for an investigation of this tragic incident and because of our concern for the safety of aviation around the world.

In its final report the ICAO condemned Israel for its attack on the airliner. It made several statements in its resolution that arguably were calculated to reinforce an existing set of expectations concerning the use of force against civilian aircraft. The Council completely ignored the

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[74] ROVINEY, A., DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, at 312 (1973). See also U.S. Dept. of State Bull., vol. 68, at 369 (1973).

[75] Id.; The resolution was adopted by a vote of 105 to 1 with 2 abstentions.

security exception Israel had advanced as justification for its attack on the airliner. It stated Israel's "attitude is a flagrant violation of the principles enshrined in the Chicago Convention," and there was "no justification for the shooting down of the Libyan civil aircraft."[76]

E. Soviet Attack on Korean Airlines Airliner (1978)

On April 20, 1978 another incident involving the use of force against an intruding civilian airliner occurred.[77] A Korean Air Lines flight from Paris to Seoul strayed into Soviet airspace. A Soviet interceptor attempted by wing signals and radio contact to direct the airliner to land. When the plane failed to comply with the instructions, a Soviet fighter fired a missile at the airliner, which sheared off the plane's left wing and tore a hole in the fuselage forcing the plane to make a crash landing on a frozen lake. Two passengers were killed and sixteen injured.[78] The Soviets released the passengers and crew but detained the pilot and navigator for questioning.[79] While in the custody of Soviet authorities, the pilot and navigator acknowledged their guilt in violating Soviet airspace and the international rules of the air. They indicated they had understood the instructions of the Soviet

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[76] Hughes, supra note 5, at 612.

[77] KEESINGS CONTEMPORARY ARCHIVES 29060 (1978); see also N.Y. Times, Apr. 21, 1978, at col. 5; id., Apr. 30, 1978, at 1, col. 5.

[78] Id.

[79] Id.

interceptors but refused to obey them.[80]

The Republic of Korea failed to protest the Soviet action. In a move which stands in sharp contrast to the strong condemnations made by states as reflected in the previously discussed incidents, South Korea expressed its gratitude to the Soviet Union for the speedy return of the passengers and crew members, and requested the return of the pilot and navigator. Following the subsequent return of the pilot and navigator on May 1, 1978, South Korea again thanked the Soviet Union for the release of the airliner's captain and navigator.[81] South Korea never condemned the Soviet Union's attack on the airliner. Apparently following South Korea's lead, there were no protests from other states as well. This incident brought into focus the issue advanced by the United States in its Memorial filed against Bulgaria.[82] Is it lawful for a state to employ force against a civil aerial intruder when the offended state can assert an articulable security interest, and the intruding civilian airliner fails to comply with instructions from the territorial sovereign? The response of the international community in the wake of this incident may indicate the answer is affirmative, assuming the intruding aircraft is given clear instructions and the opportunity to

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[80] Id.

[81] Id.

[82] Supra note 33.

land or return to its scheduled flight path, and all other reasonably available means of terminating the unauthorized entry have been exhausted.[83]

F. Soviet Attack on Korean Airline 007

On August 31, 1983 at 1400 hours Greenwich Mean Time (GMT), a Korean Air Lines Boeing 747 (KAL 007), en route from New York to Seoul, Korea, departed Anchorage, Alaska. It carried 269 passengers and crew.[84]

The airplane deviated from its assigned flight path. This deviation caused it to penetrate Soviet airspace above the Kamchatka Peninsula, the Sea of Okhotsk and Sakhalin Island. The Soviets began tracking the aircraft at approximately 1600 hours (GMT) and continued tracking it for about two and a half hours.[85]

A Soviet pilot reported visual contact with the aircraft at 1812 hours (GMT). At 1826 (GMT), the Soviet pilot reported he fired an air to air missile which destroyed the aircraft. A search and rescue mission was conducted by the Soviets approximately an hour later. There were no survivors. The dead passengers included 81 South Koreans, 61 Americans, 28 Japanese, 16 Filipinos, 10 Canadians, 6 Thais, 4 Australians,

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[83] McCarthy, G., Limitations on the Right to Use Force Against Civil Aerial Intruders: The Destruction of KAL 007 in Community Perspective, 6 New York Law School J. of Int'l. and Com. L. 177, 201 (1984).

[84] Dept. of State Bull., vol. 83, at 1 (1983).

[85] Id.

and one each from India, Malaysia, Sweden and Vietnam. The 29 crew members were South Korean.[86]

1. Initial Reaction

On September 1, 1983 the President of the United States, Ronald Reagan, condemned the destruction of the aircraft as a "horrifying act of violence" and demanded an explanation from the Soviets.[87] The Soviets countered on September 3, 1983 that the United States was "feverishly covering up traces of the provocation staged against the Soviet Union with the utilization of the South Korean plane."[88] A day later the United States disclosed that a United States' reconnaissance plane had "crossed the path taken by the Korean airliner," but it was 300 miles away at the time KAL 007 was shot down.[89]

In a nationally televised speech on September 5, 1983 President Reagan called the attack the "Korean Air Line massacre." He went on to state the incident had pitted "the Soviet Union against the world and the moral precepts which guide human relations among people everywhere. From every corner of the globe, the word is defiance in the face of this unspeakable act and defiance of the system which excuses it and seeks to cover it up." He also announced imposition of

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[86] FACTS ON FILE, 1983, at 677.

[87] Id. at 678.

[88] Id.

[89] Id.

several sanctions and demanded compensation for the families of the victims.

The United Nations Security Council opened debate on the incident on September 2, 1983. The criticism of the Soviet Union was intense and harsh. In a letter to the President of the Council Charles M. Lichenstein, Acting Permanent Representative of the United States, accused the Soviet Union of violating "fundamental legal norms and standards of international civil aviation," which prohibited the "use of armed force against civil aircraft."[90]

The Permanent Observer of the Republic of Korea to the United Nations likewise referred to the incident as a "blatant violation of basic norms of international law and practice in international civil aviation."[91]

The Canadian delegate, Gerard Pelletier, said the downing of a "civilian, unarmed, easily identifiable passenger aircraft by the Soviet Union is nothing short of murder." He also called for compensation for the families of the victims.[92]

Pakistan referred to it as a "callous disregard for the sanctity of human life," and asked for the Soviets to provide a complete explanation.

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[90] Documents Concerning the Korean Air Lines Incident, United Nations Security Council Considerations, 22 I.L.M. 1109 (1983).

[91] Id. at 1111.

[92] Id. at 680.

In addition to protesting the destruction of flight 007 Korea demanded that the Soviet Union take the following steps to honor its international obligations in the wake of the disaster:

> First, the Soviet Union must offer a full and detailed account of exactly what happened.
> Secondly, the Soviet Union must apologize and pay compensation for the destruction of the aircraft and the loss of life.
> Thirdly, the Soviet Union must punish those responsible.
> Fourthly, the Soviet Union must guarantee access to the crash site to the representatives of international organizations such as the International Civil Aviation Organization (ICAO).
> Finally, the Soviet Union must provide a guarantee against any future occurrences of attacks on civilian aircraft.[93]

The demands by the government of Korea were in effect a request that the Soviet Union comply with generally accepted state practice governing incidents that involve the use of force against civilian aircraft.

Additionally, the People's Republic of China called on the Soviet Union to compensate the families of the victims and noted also that "this incident concerns how to safeguard the established norms ensuring the safety of international civil aviation in the future and compensation for bereaved families."

2. Soviet Response

The initial Soviet response at the meeting was a reiteration of the TASS news statement issued on September 2,

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[93] Id. at 1114.

1983.[94] The statement indicated an unidentified plane violated the Soviet Union's airspace. The plane deviated from the existing international route by up to 500 kilometers and spent more than two hours over the Kamchatka Peninsula. The statement noted the aircraft was flying without navigation lights and failed to respond to radio signals. Anti-air defense aircraft were ordered to establish contacts with the plane using generally accepted signals and to take it to the nearest Soviet airfield. The intruder plane, however, ignored the instructions. A Soviet aircraft fired warning shots with tracer shells. After this the plane left Soviet airspace and continued its flight toward the Sea of Japan.[95] After outlining the Soviet's version of the facts the news release indicated the plane was used to gather "special intelligence" for the United States. It concluded with a remark that expressed regret over the loss of life, but pointed the finger of blame elsewhere.[96] It was not until September 6, 1983 that the Soviets acknowledged they had destroyed the aircraft.[97]

The Soviet explanation of the facts surrounding the destruction of KAL 007 was contradicted in part by tape recordings of transmissions between the Soviet interceptors

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[94] Id. at 1115.

[95] Id.

[96] Id.

[97] Phelps, supra note 17, at 258.

and their ground control unit. These tapes were played before the United Nations Security Council on September 6, 1983 by the U.S. Ambassador, Jeanne Kirkpatrick.[98] The tapes, ostensibly, revealed that the airliner's navigation lights were on and that the Soviet pilot never reported firing any warning shots, contrary to Soviet claims.[99] However, the tapes also indicated the plane failed to respond to Soviet attempts to identify the aircraft electronically as a friend or foe (IFF).[100] In spite of the tapes the Soviets stuck to their version of the facts, characterizing the destruction of the airliner as consistent with "the sovereign right of every State to protect its borders."[101]

3. International Response

On September 12, 1983, the UN Security Council voted on a resolution to declare the Soviet use of force "incompatible with the norms governing international behavior and elementary

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[98] Id. at 260.

[99] Supra note 89, at 1122.

[100] Id.; IFF was explained to the members of the Security Council as an electronic interrogation by which military aircraft identify friends or foes. Commercial aircraft are not equipped to respond to IFF. However, the Soviet Union indicated its messages were also sent on the international emergency frequency, and the plane failed to respond.

[101] N.Y. Times, Sept. 12, 1983, at 1 col. 1. A revised statement by the State Department indicated six minutes before the final shooting, the Soviet pilot told his base that he fired "canon bursts," which presumably were warning shots.

considerations of humanity."[102] The Soviet Union's veto of the resolution prevented its adoption.[103] However, the wording of the document left little doubt that the other members of the Council rejected the Soviet's asserted defense for downing the airliner.

Thirteen North Atlantic Treaty Organization (NATO) countries imposed a two-week ban on civilian flights to and from the Soviet Union.[104] France, Greece and Turkey were the only NATO countries that failed to comply with the ban.

Additionally, the International Federation of Airline Pilots' Associations voted to declare the Soviet Union an "offending state" and to call a sixty - day ban on all flights to Moscow.[105] The boycott was ended prematurely because the International Civil Aviation Organization (ICAO) agreed to investigate the incident.

The ICAO investigated the disaster at the request of Canada and the Republic of Korea. However, the Organization was unable to comprehensively review the facts and assess the application of the Soviet's asserted intercept procedures, signalling or communication because the Soviets refused to

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[102] U.N. Doc. S/15966/Rev. 1 (1983), reprinted in 22 I.L.M. 1148 (1983).

[103] U.N. Doc. S/PV. 2476 (1983), reprinted in 22 I.L.M. 1144 (1983).

[104] FACTS ON FILE, at 700 (1983).

[105] Press Statement, reprinted in 22 I.L.M. at 1218 (1983).

cooperate with the investigation.

The report concluded the intrusion was inadvertent despite Soviet claims it was on an espionage mission. It determined the crew was unaware of any Soviet warnings or intercept attempts. Furthermore, the ICAO Council adopted a resolution condemning the destruction of KAL 007 stating that "whatever the circumstances which, according to the Secretary General's report, may have caused the aircraft to stray off its flight plan route, such use of armed force constitutes a violation of international law, and invokes generally recognized legal consequences..."[106]

On September 15, 1983 the governors of New York and New Jersey ordered the Port Authority of New York and New Jersey to refuse a State Department request to allow a Soviet delegation to the United Nations to land Soviet planes at Kennedy or Newark International airports.[107] The governors raised a thinly veiled concern about their inability to guarantee the Soviet diplomats' safety in the climate of hostility arising from the destruction of flight 007.[108] However, they suggested that a military base might be used as an alternative. The State Department in turn offered the

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[106] Resolution adopted by the Extraordinary Session of the Council of the ICAO on September 16, 1983, reprinted in 22 I.L.M. 1150 (1983). The report failed to state what the legal consequences were.

[107] Supra note 104, at 717.

[108] Id.

Soviets the use of a military base for landing purposes as long as they did not travel in a Soviet civilian air carrier, i.e. Aeroflot.[109]

The Soviet Union, in announcing its cancellation of the official trip to the United Nations, noted the United States was violating its obligations as the United Nations host country.[110] In response to complaints from various nations about the United States' treatment of the Soviet delegation, members of the United Nations were told if they did not like it they should relocate the United Nations' headquarters to a different country,[111]even though the 1947 headquarters agreement between the United Nations and the United States prohibits federal, state or local authorities from impeding transit to or from the United Nations of any United Nations representative "irrespective of the relations existing between the government of the persons referred to in that section and the government of the United States."[112]

The thrust of the legal arguments over the legality of the Soviet's action in downing the airliner was initially centered on the provisions of the Chicago Convention outlining

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[109] Id.

[110] Id.

[111] Id.

[112] Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations, Article IV, Communications and Transit, sections 11 and 12, 1947-48 U.N.Y.B., 201, U.N. Sales No. 1949.1.13.

appropriate procedures to be used in intercepting civil aircraft.[113] This focus on facts which were primarily in the control of the Soviet Union, like the vehement political exchanges between the United States and the Soviet Union, obscured the real legal issues and allowed the Soviets to hide behind esoteric discussions of sovereignty and compliance with "procedures" concerning signal, warning, and guidance procedures for the interception of civil aircraft. During the course of the meeting, however, the discussion of the legality of the Soviet's action began to focus, more importantly, on norms which, arguably, trumped treaty law, condemning what the Soviet's insisted was a permissible exercise of force under the Chicago Convention. The legal argumentation in support of those norms has its roots in the norm creating process referred to as the practice of states.

G. United States Attack on Iran Air 655

The most recent incident involving the use of deadly force against a civilian airliner on a scheduled flight occurred approximately five years after the Soviet downing of KAL 007. Although this incident does not involve the use of fighter aircraft, it provides an up to date opportunity for analyzing the practice of states as it relates to the use of force against civilian airliners. It also provides an opportunity

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[113] Note, Legal Argumentation in International Crises: The Downing of Korean Air Lines Flight 007, 97 Harv. L. Rev. 1198 (1984).

to examine evidence which suggests that the payment of compensation for the destruction of civilian airliners is inextricably tied with notions of elementary considerations of humanity.

1. Facts

On July 3, 1988 a U.S.Navy warship positioned in Iranian territorial waters shot down an Iranian commercial airliner on a scheduled flight within Iranian national airspace over the southern Persian Gulf after mistaking it for an attacking F-14.[114] The 290 people aboard the plane were killed, making it the worst disaster in aviation history involving the use of military force against a civilian airliner. The dead included individuals from six countries in addition to Iran: India, Italy, Kuwait, Pakistan, the United Arab Emirates, and Yugoslavia."[115]

Iran Air Flight 655 was on a scheduled flight from the Iranian city of Bandar Abbas southwest across the Strait of Hormuz to Dubai in the United Emirates. It was flying in a war zone where the U.S.S. Vincennes was engaged in a skirmish with several Iranian gunboats. Two of the gunboats were sunk and the third was damaged.[116] The surface combat was one of the factors the United States used in explaining the defensive

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[114] EDITORIALS ON FILE, at 746 (1988); see also N.Y. Times, July 4, 1988, at 1, col. 6.

[115] Dept. of State Bull., vol. 88, at 58 (1988).

[116] Supra note 114.

measures taken by the Vincennes when it mistakenly identified the airliner as hostile. The United States expressed deep regret over the loss of innocent life, but defended its right to use self-defensive measures under the perceived threat of an attack.[117]

On July 11, prior to the completion of any investigation into the incident and several days prior to a meeting of the ICAO to discuss the downing of the plane, President Reagan announced the United States would pay compensation to the families of the victims.[118] It was emphasized these payments would be made on a purely "humanitarian and voluntary basis, not on the basis of any legal liability or obligation."[119]

The response of the international community was mixed. Britain expressed regret over the loss of life but an "understanding" of the warship's downing of the airliner. Correspondingly, most of America's allies expressed regret over the military action which resulted in the loss of life, but no protests or condemnations were made.[120]

The Soviet Union condemned the attack on the airliner but refrained from any political attacks on the motives of the United States, noting it was demonstrating an approach that

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[117] Id.

[118] N.Y. Times, July 12, 1988 at, col. 6.

[119] Id.

[120] N.Y. Times, July 15, 1988 at 9, col. 1; See also N.Y. Times, July 11, 1988 at 1, col. 1.

was "more restrained in the face of this kind of incident than Washington was in the days following the Soviet downing of Korean Air Line Flight 007."[121] Pakistan and Libya condemned the United States but most Arab states were "restrained in their remarks."[122]

The Security Council declined to approve a resolution condemning the United States despite a strong lobbying effort by Iran.[123] Correspondingly, the ICAO refused to comply with Iran's call for condemnation of the United States. Instead it issued a statement deploring the use of weapons against civilian aircraft without mentioning the United States by name,[124] and outlined safety recommendations which advocated a need for coordination between military and civil authorities in any area where military activities might constitute a threat to civil aviation (see Annex A).[125] It is submitted, the international community's restrained response to the United States was in part due to the decision by the United States to pay compensation to the families of the victims. It would also appear that the prospect of negative world opinion, in the absence of compensating the families of the victims, may

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[121] Id.

[122] Id.

[123] N.Y. Times, July 15, at 1, col. 1.

[124] Id. at 8, col. 4.

[125] Lowenfeld, A., AGORA: The Downing of Iran Air Flight 655, Am. J. Int'l. L. at 318 (1989).

have played a part not only in the United States' decision to pay but in the timing of the announcement.

Notwithstanding its offer to pay compensation to the families of the victims and conduct negotiations with the six non Iranian governments who had nationals that perished on board Iran Air 655, the United States declared it would not make payments directly to the government of Iran, but would attempt to use an intermediary to disburse payments to the families of Iranian victims. This strategy, not surprisingly, was complicated by Iran's decision not to cooperate with the United States' intended payment plan.[126] Iran's decision not to acquiesce in the United States' attempt to bypass the traditional method for making ex gratia payments through the government of the nationals injured is reflected in its independent course of action designed to force the United States to pay compensation to it on its own terms. For example, Iran's refusal to supply the United States with a passenger manifest, or make public the names of the dead, has resulted in a significant delay in the payment of compensation to the families of the victims despite extraordinary attempts by State Department personnel to acquire the names and addresses of the passengers on the air bus and their potential heirs by using the assistance of family members of several

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[126] Message from American Embassy at ABU DHABI to Secretary of State reference 280600z Mar 89.

known passengers to compile a list of potential claimants.[127]

This unconventional approach of attempting to fulfill its promise to pay compensation without going through the government of the nationals involved is fraught with opportunity for fraud, as well as the potential for political accusations that the United States is reneging on its promise to pay. There will undoubtedly be problems with determining the identification and location of most of the surviving family members. If setting the amount of compensation is to be individually tailored as opposed to a lump sum payment, the gathering of sufficient details to provide some type of actuarial projections on the victims will be virtually impossible without the assistance of the home country of the deceased.

If the United States bases the amount of compensation on the laws of the state of the deceased's nationality, it will be necessary to determine Iranian wrongful death laws. Iranian laws concerning compensation limits in wrongful death actions, or laws concerning who can receive payments on behalf of children or widows\widowers may be ascertainable by conferring with United States' attorneys familiar with Iran's version of Islamic law. However, establishing the facts necessary for application of those laws may be very difficult without Iran's cooperation. Furthermore, from a logistics standpoint it would

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[127] Id.

seem to be almost impossible to get funds to another country's nationals residing in their home country without the permission of the state involved. Even so, in the interest of providing aid to its citizens, Iran may eventually decide to allow payments to be made through an international intermediary such as the Red Crescent, Swiss government, or the ICAO.

2. Iran's Application to the ICJ

On May 17, 1989 the Government of the Islamic Republic of Iran filed an application with the ICJ to initiate proceedings against the United States for its destruction of Iran Air 655.[128] The application was styled as an appeal from the March 17, 1989 decision by the ICAO which failed to condemn the United States. Iran asserted that the warrant for the court's jurisdiction existed in the Chicago Convention of 1944 as amended and the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention) of 1971.

The Iranian application essentially raises two questions: (1) is the United States subject to the compulsory jurisdiction of the ICJ for the shooting down of Iran Air 655; and (2) should the United States submit to the jurisdiction of the ICJ voluntarily if compulsory jurisdictions does not exist?

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[128] Reproduced from materials provided to the Department of State, 1989 ICJ Pleadings (Aerial Incident of 3 July 1988).

Article 84 of the Chicago Convention states:

> If any disagreement between two or more contracting States relating to the interpretation or application of this Convention and its Annexes cannot be settled by negotiation, it shall, on the application of any State concerned in the disagreement, be decided by the Council. No member of the Council shall vote in the consideration by the Council of any dispute to which it is a party. Any contracting State may, subject to Article 85, appeal from the decision of the Council to an ad hoc arbitral tribunal agreed upon with the other parties to the dispute or to the Permanent Court of International Justice. Any such appeal shall be notified to the Council within sixty days of receipt of notification of the decision of the Council.

Disagreements between contracting states on the interpretation or application of the convention may be referred to the ICAO Council for decision. An appeal from an adverse decision may be made to an ad hoc arbitration panel or the the Permanent Court of International Justice (PCIJ) within sixty days of notification of the decision by the Council.

The Iranian application fails to address whether the matter was referred to the ICAO under Article 84 which controls dispute resolutions, or under Article 54 (n) which only requires the Council to "consider any matter relating to the Convention." The absence of this reference as a basis for jurisdiction would lead one to surmise that the incident was referred to the ICAO under Article 54 which provides no procedural basis for appeal of a decision by the ICAO.

The United States was not a member of the League of Nations and therefore did not accept the authority of the PCIJ. An argument, however, may be made that in accepting the

compulsory jurisdiction of the ICJ[129] the United States by implication agreed to substitute the ICJ for the PCIJ in treaties that referred matters to the PCIJ.[130] Particularly, in the case of the Chicago Convention, since it came into force as to the United States in 1947 and the Statute of the ICJ came in force as to the United States in 1945.[131]

Additionally, on October 7, 1985 Secretary of State George Schultz deposited with the Secretary-General of the United Nations notice of termination of the United States' acceptance of the ICJ's compulsory jurisdiction.[132] The action became effective six months after deposit of that notice. Yet the issue remains unsettled since Schultz specifically did not terminate acceptance of compulsory jurisdiction of the Court as to treaties in force.[133]

Finally, it may be argued that Iran's appeal is barred on procedural grounds for failing to comply with the statute of limitations of sixty days contained in Article 84.

Iran also alleges the United States violated the Montreal Convention as follows:

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[129] Dept. of State Bull., vol. 15, at 452 (1946).

[130] Statute of the ICJ, Article 37.

[131] Id.

[132] United States: Department of State Letter and Statement Concerning Termination of Acceptance of I.C.J. Compulsory Jurisdiction, October 7, 1985, reprinted in 24 I.L.M. at 1742 (1985).

[133] Id. at 1745.

> "by refusing to accept liability for the actions of its agents in destruction of IR 655, and by failing to pay compensation for the aircraft, or to work out with the Islamic Republic a proper mechanism for determination and payment of damages due to the bereaved families, the United States has violated Article 1, 3, and 10(1) of the Montreal Convention."

Article (1) of the Montreal Convention refers to persons not states who commit an offense.[134] Article 3 contemplates contracting states making offenses under "Article 1 punishable by severe penalties."[135] And Article 10 (1) requires parties to the Convention to take measures to prevent offenses enumerated in Article 1.[136] The Montreal Convention is directed against actions by persons not by states. Therefore the Convention does not provide a legal basis for jurisdiction before the ICJ on these facts.

Iran's application also failed to plead that the requirements of Article 14 (1) which mandate that attempts at negotiation or arbitration have been exhausted. The application stated in a footnote to an unsupported allegation that "efforts to resolve the dispute have been unsuccessful" and that the "arbitration" referred to in the Convention "cannot be considered as a viable course of action." Therefore, even if the Convention were applicable to states

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[134] Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention) of September 23, 1971.

[135] Id.

[136] Id.

and not individuals, Iran's inability to delineate any attempt or request for negotiation or arbitration with the United States indicated Iran failed to satisfy the conditions precedent that were set out in Article 14 (1) of the Montreal Convention, and therefore the Convention could not serve as a treaty basis for compulsory jurisdiction against the United States.

III. Military Aerial Intrusions

Military aircraft, unlike civil aircraft, may generally be viewed as potentially posing an inherent threat to a country's security. A single plane may carry atomic weapons of immense destructive power or sophisticated intelligence gathering equipment which pose a direct threat to the physical integrity of the overflown state. It is therefore understandable that most states view intrusions by military aircraft in a different light than those by civilian airliners. There have been few if any international outcries over the downing of an intruding military aircraft. Most protests have been confined to the states involved in the particular incident in question. Still, there appear to be certain rules of behavior also protecting inadvertent aerial trespass by military aircraft.

The following incidents will once again indicate that the Soviet Union has done most of the shooting. There also exists the familiar factual dispute in the legal argumentation

surrounding each incident. In each case, the attacking State claimed a violation of its airspace and a failure to comply with instructions, while the State of the downed aircraft, usually the United States, claimed its aircraft was attacked over international waters or that the intrusion was accidental and non hostile.

A. Definition of Military Aircraft

In 1922 the Aeronautical Advisory Commission to the Peace Conference, drew up rules to distinguish civil aircraft from military aircraft. The defeated powers of World War I were forbidden by the Peace Treaties to possess military aircraft. These rules were known as "The Nine Rules," and they formed one of the first international attempts to authoritatively define military aircraft. The rules focused on design and construction of aircraft as the basis for determining whether aircraft was classified as military or civil.[137]

A year later this definition underwent a significant modification. A group of jurists gathered at the Hague and proposed adoption of the Draft Hague Rules of Warfare of 1923. Article 14 of the Rules stated that "a military aircraft should be under the command of a person duly commissioned or enlisted in the military service of the State; the crew must

[137] Fedele, F., Overflight by Military Aircraft in Time of Peace, 9 Air Force JAG L. R., No. 5 at 8 (1967).

be exclusively military."[138]

That definition of military aircraft soon fell by the wayside as too unrealistic. In 1939, the Harvard Research Draft on Rights and Duties of Neutral States in Naval and Aerial War simply defined military aircraft as any aircraft used for military purposes.[139] The committee concluded that no distinction could be made between civil and military aircraft based on design and construction, but only on use. The Naval Advisor to the American Delegation to the Committee stated that some of the military uses of aircraft were:

1. To collect information.
2. To combat other targets.
3. To attack surface targets.[140]

Numbers 1 and 3 of the foregoing uses are areas of concern where a civilian flight might potentially be used as a military aircraft.

The next step in the evolution of the description of military aircraft is found in Article 3(b) of the Chicago Convention of 1944 which states that "aircraft used in military, customs and police services shall be deemed to be

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[138] General Report of the Commission of Jurists at the Hague, 17 Am. J. Int'l. L. Supp. 245-260 (1923). The rules were never adopted as an international convention. However, they served as an authoritative statement of the rules of international air law applicable during war time.

[139] Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, with comments: Research in International Law of the Harvard Law School, 33 Am. J. Int'l. L. Supp. 169-817 (1939).

[140] Fedele, supra note 137.

State aircraft." This shift in the criteria for distinguishing on an international level the character of aircraft as military or civilian from the specific and detailed 1922 concentration on design and construction to the purposeful ambiguity of Article 3(b) of the Convention in effect left each contracting state with the unilateral discretion of determining what constituted a military, as distinguished from a civil flight.

This ambiguity undermines the safety of scheduled civil flights by placing their legal status in limbo. For example, the Soviet Union sought to exploit this failure to establish a clear definition of military aircraft in articulating its legal justification for the downing of KAL 007. The Soviets claimed emphatically that KAL 007 was being "used" for gathering intelligence information. Therefore, as their logic appears to run, the plane was serving as a military aircraft which made it fair game for Soviet fighters when it failed to respond to instructions to land. This argument, of course, still rests on the Soviet's mistaken belief the aircraft was a military plane.

The United States Navy defines military aircraft as "all aircraft operated by commissioned units of the armed forces of a nation, bearing the military markings of that nation, commanded by a member of the armed forces, and manned by a

crew subject to regular armed forces discipline."[141] As a domestic definition of military aircraft this definition is less ambiguous and therefore at first glance preferable to the focus on use, but as the Iran Air incident proved, in the heat of battle this definition affords no more protection to civil aircraft than any other, since it presumes an appropriate inspection will occur to determine the character of the aircraft.

Military aircraft, like scheduled civilian flights, may not generally enter the national airspace of a foreign nation without permission. So, what is the status of a military plane which unintentionally intrudes into the national airspace of a foreign territory? What effect, if any, do the applicable principles of international law governing the status of military aerial intruders have on the treatment of civilian flights?

B. Yugoslavian Attacks on American Military Aircraft

Shortly after World War II on August 9, 1946 an American C-47 military transport while on a regular flight from Vienna to Udine encountered bad weather and was forced into Yugoslavian airspace. At approximately 1300 it was attacked by Yugoslav fighters. One passenger, a Turkish officer, was

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[141] Naval Warfare Publication, The Commander's Handbook on the Law of Naval Operations, at 2-2 (1987); hereinafter called NWP-9.

seriously wounded and the plane was forced to crash land.[142] Yugoslav authorities subsequently detained the plane and arrested the crew and passengers. In a protest note to the Yugoslav government the American Ambassador in Belgrade demanded the release of the passengers and crew and requested "an urgent Yugoslav statement whether in the future the United States Government can expect that the Yugoslav Government will accord the usual courtesies, including the right of innocent passage over Yugoslav territory, to United States aircraft when stress of weather necessitates such deviation from regular routes."[143] The protest note requested a response within forty-eight hours, and indicated that the matter would be referred to the United Nations Security Council if Yugoslavia failed to respond.[144] Additionally, the United States asserted it had a right to claim compensation.

On August 19 a second military transport was shot down while traveling from Vienna to Italy. The crew and the passengers were killed. The United States asserted that this plane had also encountered bad weather and was forced by it into Yugoslav airspace. Yugoslavia, as in the case of the plane downed on 9 August, expressed its regret over the event, referring to it as an unhappy "accident." It also claimed once

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[142] Dept. of State Bull., vol. 15, at 415 (1946).

[143] Id.

[144] WHITEMAN, M., DIGEST OF INTERNATIONAL LAW, vol. 12, at 323 (1971).

again the United States' plane had failed to comply with instructions to land.

The United States protested that the airplanes were unarmed passenger planes which did not constitute a threat to the sovereignty of Yugoslavia and therefore the use of force could not be justified under international law.[145] Furthermore, the note stated that "the deliberate firing without warning on the unarmed passenger planes of a friendly nation is in the judgment of the United States an offense against the law of nations and the principles of humanity."

The Yugoslav government apparently acquiesced to the legal position of the United States with respect to military transport aircraft forced by weather to make unauthorized intrusions into foreign airspace.[146] Yugoslav released the passengers and crew of the plane shot down on 9 August and promised the incident would not be repeated. America was allowed to join in the search for survivors and investigate the site of the August 19 crash.

In a letter to the United States Ambassador, the Yugoslav government stated it would no longer fire on transport aircraft, even if their intrusion into Yugoslav airspace was intentional. If an aerial intrusion occurred, the plane would be directed to land. If the pilot refused, steps would be

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[145] Id. at 417.

[146] Whiteman, supra note 38, at 648.

taken through appropriate diplomatic channels.[147]

On October 8, 1946 the United States acknowledged the receipt of $150,000 as indemnity for the lives of the five Americans killed when the military transport was shot down on August 19. The money, in compliance with the request of Yugoslavia, was to be divided in five equal payments of $30,000 each to the families of the deceased.[148] Yugoslavia initially refused to pay compensation for the loss of the two aircraft. However, on July 19, 1948 the Government of the United States and the Government of Yugoslavia concluded a settlement agreement in which Yugoslavia paid $17,000,000 to satisfy pecuniary claims of the United States and its nationals resulting from Yugoslavia's nationalization of American enterprises located in Yugoslavia. In an aide memoire, dated August 13, 1954 Yugoslavia acknowledged that the amount of $148,096.44 for the loss of the transport planes was included in the $17,000,000 settlement agreement.[149]

C. Soviet Attacks on American Military Aircraft

In each of the following encounters with the Soviets, the factual discrepancies between the type of planes, location of the attacks, and circumstances of the attacks make it

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[147] Id. at 505.

[148] Id. at 725.

[149] Id. at 891; The amount of $148,096.44 for the loss of the two transport planes and a jeep confiscated by Yugoslavia on July 13, 1946 was awarded the United States by the Foreign Claims Settlement Commission of the United States.

difficult to draw any general conclusions of law from the incidents. Nevertheless, it may be inferred that since the Soviet accounts were careful to claim each airplane was over Soviet territory, that at a minimum the Soviets do not claim a right to attack military aircraft over the high seas that may be in close proximity to their borders.

1. April 8, 1950

On April 8, 1950 an unarmed United States Navy Privateer airplane with ten persons on board left Wiesbaden at 10:31 a.m. Greenwhich time for a flight over the open waters of the Baltic Sea. The plane was attacked and destroyed by Soviet fighters. All personnel on board were killed.

In a protest note the United States demanded that the Soviets conduct an investigation into the incident, issue a promise there would be no future attacks on unarmed military aircraft, provide the United States with an apology and pay compensation for the destruction of American lives and property.[150]

The Soviets responded in a diplomatic note that an American B-29 was observed penetrating Soviet airspace at 17 hours 39 minutes. Soviet fighters intercepted the aircraft and instructed it to land. The American plane allegedly opened fire on the Soviet fighters who ostensibly returned fire in self-defense, after which the B-29 "disappeared toward the

[150] Dept. of State Bull., vol. 22, at 667, 753 (1950).

sea." This account was followed by a strongly worded protest of the "gross violations" of the Soviet border in "violation of elementary standards of International Law."

2. November 6, 1951

On November 6, 1951 the United States representative to the United Nations filed a complaint with the Security Council that a United Nations plane, a two-motored P2V bomber operating in connection with United Nations operations in Korea was destroyed by the Soviet Union. The airplane according to the United States was flying weather reconnaissance over the Sea of Japan with orders not to approach closer than 20 miles to Soviet territory under any circumstances when it was destroyed.[151]

The Soviets issued their standard account of encounters of this type claiming the aircraft violated the Soviet border, was intercepted by Soviet fighters, instructed to land and refused. The plane then opened fire on the fighters forcing them to defend themselves. The plane then "disappeared toward the sea."

3. November 19, 1951

The facts as set forth by the United States indicate at approximately 1100 hours on November 19, 1951 an American C-47 number 6026 set off from Erding, Germany, for Belgrade, Yugoslavia. While enroute the plane was blown off course by

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[151] Dept. of State Bull., vol. 25, at 909 (1951).

unexpected winds which caused it to fly beyond its destination. The Hungarian and Russian authorities monitored the course of the aircraft but refused to assist the plane or to respond to radio calls for assistance. The airplane penetrated Hungarian airspace and was brought down by Soviet fighters. Based on these facts the United States asserted the Hungarian government knew that the violation of its airspace was unintentional and that the C-47 posed no security threat.[152]

The four American airmen on board the aircraft were arrested and held incommunicado by Soviet authorities from November 19, 1951 until December 3, 1951. The airmen were released to American authorities on December 28, 1951.

The United States note to the Hungarian and Soviet Governments summarized the violations of international law in the interception of the aircraft, inter alia, as follows:

> 1. The flight of C-47 6026 from Erding, Germany, on November 19, 1951 was solely for the purpose of delivering air freight to the American Air attache' at Belgrade; that the airplane was blown off course by winds whose direction and velocity were unknown to the crew; that the plane unknown to the crew flew north of course to Rumania, that, therefore, being unable to descend at Belgrade the crew turned westward to return to their base; and that unwittingly they crossed the Hungarian border.[153]
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> 2. The notes assert further that the crew, finding they were lost made every effort to obtain assistance from persons on the ground; that the Soviet and Hungarian authorities knowing these facts deliberately withheld assistance and Soviet fighters attacked the plane a short distance from the safety of the British Zone of Austria.

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[152] Id.

[153] Dept. of State Bull., vol. 28, at 497 (1953).

3. The four man crew was seized and detained.
4. The men were tried and convicted. The Hungarian court fined each airmen approximately $30,000.[154]

The United States' note demanded payment of $637,894.15 in damages for the value of the airplane; its equipment, and cargo plus an additional $123,605.15 on account of the fine paid by the United States Government to the Hungarian Government to obtain the release of the four airmen; $200,000 in compensation for the airmen; and $215,509.67 on account of damage to the United States.[155]

In a statement to the Security Council the United States declared the following:

> "What we have asked and continue to ask is that the Soviet Government negotiate in good faith on a bilateral basis for a settlement of the claims presented. We have asked further that, if a settlement cannot be reached, the Soviet Government consent to impartial adjudication of the issues by the International Court of Justice. This is exactly what the United States itself is prepared to do in the case of similar claims which the Soviet Union might present. This we are prepared to do even though we may consider the claims put forward to be completely without foundation."[156]

On February 16, 1954 the United States instituted proceedings in the ICJ against the Governments of Hungary and the Soviet Union. The cases were dismissed for lack of jurisdiction because Hungary and the Soviet Union failed to

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[154] Id.; The sum of $123,605.15 was paid by the United States under protest.

[155] Id.

[156] Dept. of State Bull., vol. 31, at 449 (1954).

accept the Court's jurisdiction for this dispute.[157]

4. October 7, 1952

This incident involved several questions of international law including the validity of the Soviet Government's claim to sovereignty over the Habomai Islands situated off Hokkaido, Japan. This claim entailed the interpretation of the Treaty of Peace with Japan signed at San Francisco on September 8, 1951 by various nations.

On October 7, 1952, an unarmed United States Air Force B-29 airplane was dispatched from its base in the Island of Honshu in Japan at 1100 hours, to perform a flight mission over the Island of Hokkaido, Japan and upon completion to return to its base. At approximately 1400 hours, while the B-29 was over the mainland of Hokkaido, flying at approximately 15,500 feet altitude, two Soviet fighters were deployed to intercept the B-29. While effecting a turn at the end of Nemuro Peninsula of the Island of Hokkaido in order to fly westward and farther into the mainland of Hokkaido, the B-29 was attacked by the Soviet fighters as well as ground fire from Soviet personnel stationed on Yuri Island, which is located east of the Nemuro Peninsula. The plane plunged into the sea between Yuri Island and Akiyuru Island, southwest of

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[157] Case of the Treatment In Hungary of Aircraft and Crew of United States of America (United States of America v. Hungarian People's Republic), Order of July 12, 1954, ICJ Reports (1954) 99; and ibid. (United States v. Union of Soviet Socialist Republics), at 103.

Harukarimoshiri Island, all territory claimed by Japan.

The United States asserted that some or all of the crew successfully parachuted to the sea at approximately the position where the aircraft hit the water. Soviet patrol boats were spotted allegedly picking up survivors and the bodies of any dead crew members.

The Soviet Union charged that the bomber violated the Soviet frontier in the area of Yuri Island. The United States stated the plane did not fly over Yuri Island. The United States also asserted that the question of violating the Soviet border could not arise since the island of Yuri was not Soviet territory, but was under Japanese sovereignty. The radar plot of the tracks of the United States and Soviet aircraft showed that the interception by the Soviet fighters occurred 32 miles from Yuri Island and six miles from the Island of Hokkaido. The United States protested the "unprovoked shooting" and requested payment of appropriate compensation for the loss of life and the aircraft.[158]

The Soviet response followed the boiler plate description of alleged provocation it used in each of the preceding incidents with the plane "disappearing in the direction of the sea," after the encounter. The Soviets also stated they had no knowledge regarding the whereabouts of the crew members of

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[158] Dept. of State Bull., vol. 27, 649-650 (1952). ICJ Pleadings, Aerial Incident of October 7, 1952 (United States of America v. Union of Soviet Socialist Republics), 1956.

the B-29.

5. July 29, 1953

On July 29, 1953 a United States Air Force RB-50 on a routine navigational training mission over the Sea of Japan was shot down by Soviet MIG aircraft. The shooting down of the aircraft occurred 40 miles off the Soviet coast south of Cape Povortny. The American copilot was rescued by a United States vessel, while other survivors of the crash may have been picked up by Soviet vessels.[159]

The copilot later stated that the attack came without warning while the RB-50 was flying over international waters and that the RB-50 returned fire after the Soviet fighter made its first attack setting one the airplane's engines on fire. He also claimed immediately, following the first attack, "another firing pass was made by a MIG-15, disabling a second engine and setting its wing on fire."

An American rescue plane dropped a lifeboat to a group of four survivors; three additional survivors were spotted about a half mile east of the lifeboat and 12 Soviet PT boats were also spotted in the area. The United States protested the shooting and requested that the Soviet Government immediately repatriate any survivors, as well as pay compensation for the downing of the aircraft and any injury or death to the airmen.

The Government of the USSR, in reply, for the first time

[159] Dept. of State Bull., vol. 29, at 179 (1953).

asserted a protest that on July 27, 1953 four American fighter planes invaded the border of the Chinese People's Republic, and attacked and brought down a Soviet passenger airplane, IL-12 which was on a scheduled flight from Port Arthur to the USSR on an established route. The 15 passengers and 6 crew members who were on board perished.[160] Furthermore, the Soviet Government demanded strict punishment for those guilty of the attack; a promise of no future reoccurrence; and compensation in the amount of $1,861,450 for the death of the 21 Soviet citizens and the loss of the aircraft.

While stating the incidents were separate and should not be addressed simultaneously, the United States' reply confirmed that an IL-12 was shot down by a United States Army Air Force fighter plane on a combat mission for the United Nations Command over Korean territory. However, the reply also noted the attack occurred inside Korean territory approximately eight miles from the Yalu River.[161] The United States rejected the Soviet Note as being "without foundation in fact" since the attack was carried out over Korean territory prior to the termination of hostilities. The note went on to state:

> The United States Government can only deplore the loss of life incurred in this incident. In view of the fact, however, that the incident occurred in the Korean Zone of hostilities, the responsibility therefore must rest with those Soviet authorities who flew the Soviet aircraft

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[160] Id.

[161] Id.

through Korean territory.

6. September 4, 1954

The United States asserted that on September 4, 1954 a United States Navy P2V Neptune-type patrol aircraft departed from its base at Atsugi, Japan, under orders to conduct a routine patrol mission in the international airspace over the Sea of Japan upon a course from Niigata, Japan. It was conducted, under the authorization of the Security Treaty with Japan. It had a crew of ten members of the United States Navy.

The aircraft attained an altitude of about 8,000 feet and maintained a normal cruising speed of about 180 knots. At 1807 hours, while the airplane was flying on a course of 067 degrees magnetic, over the high seas of the Sea of Japan, it was attacked by two Soviet fighters. The Neptune sustained serious damage but the pilot was able to land the plane on the sea. Nine members of the crew escaped on a raft. The tenth member of the crew was trapped in the fuselage and lost his life when it sank. No attempt at rescue was made by the Soviet Government. However, United States rescue aircraft picked up the survivors.

The Soviet Government claimed the Neptune violated the State frontier of the Soviet Union in the region of Cape Ostrovnoi to the east fo the Port Nakhodka. The Soviets again asserted the Soviet fighters peacefully approached the American aircraft to inform it that it was within the territorial limits of the Soviet Union, and the aircraft

opened fire on the Soviet planes, which "were forced to open return fire." Characteristically, the Soviets claimed the American aircraft "withdrew in the direction of the sea" after the encounter.

The United States protested the attack as unprovoked and in violation of international law. The United States again filed proceedings in the ICJ against the Soviet Union.[162]

7. November 7, 1954

The legal dispute between the United States Government and the Soviet Union which erupted over the Aerial Incident of October 7, 1952 flared up again on November 7, 1954. The issue once more involved the legality in international law of the Soviet claims to land, waters and airspace in the area of the Hobomai Islands and Shikotan, and to Kunashiri and Etorofu, and their territorial waters and airspace.

This incident also involved the interpretation of the Treaty of Peace with Japan signed by the United States and other governments in San Francisco on September 8, 1951. The United States claimed that Soviet fighters overflew international airspace and the territorial airspace of Japan in the area of Hokkaido to intercept and destroy a United States Air Force B-29 airplane. The aircraft was within Japanese airspace at the time of the attack.

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[162] ICJ Pleadings, Aerial Incident of September 4, 1954 (United States of America v. Union of Soviet Socialist Republics), 1958.

The United States noted it was authorized by virtue of the Security Treaty between the United States and Japan, signed September 8, 1951, to conduct flights by military aircraft over Japanese territory. The eleven member crew of the B-29 were nationals of the United States. The aircraft flew along the southeast end of Hokkaido to a point south of the town of Nemuro. The pilot then made a turn to fly back along a parallel latitude approximately 43 degrees, 18 minutes north, running through the island of Tomoshiri in the east and through the town of Shibecha in Hokkaido in the west. The B-29 executed a left turn over the international waters of the Pacific toward a heading of approximately 360 degrees due north, southwest of the tip of Nemuro Peninsula. Two Soviet fighters attacked the B-29 while it was flying due west on a heading of 270 degrees in the Japanese territorial airspace. There was no warning from the Soviet fighters prior to the attack. The crew was forced to abandon the aircraft by parachute. The airplane crashed on Japanese soil near the village of Kamishunbetsu in Hokkaido. One crew member who parachuted from the aircraft was seriously injured and died.

The Soviet Union responded that the B-29 had violated the state boundary of the Soviet Union in the region of the island of Tanfilev (Kurile Island). Soviet fighters were dispatched to instruct the American plane to immediately leave the airspace of the Soviet Union. The B-29 opened fire on the Soviet fighters in an unprovoked attack. The Soviet fighters

returned fire and the American airplane left the airspace of the Soviet Union in a southwesterly direction.

The United States protested the incident as an unprovoked attack and noted that the Soviet Union had not replied to a previous United States protest of the destruction of another B-29 in approximately the same area and under the same circumstances. The protest note went on to reiterate that the United States Government supports the Japanese Government's contention that the Habomai group is an integral part of the national territory of Japan. The note also asserted that the Soviets were illegally occupying Japanese territory in the Hobomai Islands as well as carrying out unprovoked attacks on United States aircraft lawfully in this region.[163]

8. July 1, 1960

The Soviet Union announced on July 11 that a Soviet fighter shot down a United States Air Force RB-47 jet reconnaissance bomber on July 1, 1960 as it penetrated Soviet airspace over the Barents Sea near the Kola Peninsula. The USSR said 2 of the plane's 6 crewmen were rescued and would be tried for violating Soviet territory.[164]

The Soviet announcement was contained in a protest against alleged United States resumption of "espionage flights over

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[163] ICJ Pleadings, Aerial Incident of November 7, 1954 (United States of America v. Union of Soviet Socialist Republics), 1959.

[164] FACTS ON FILE at 233 (1960).

the USSR," a reference to the earlier downing of the U-2 spy plane flown by Gary Powers, discussed hereafter in the section on penetrative reconnaissance. The Soviets claimed the RB-47 ignored instructions to land and "continued moving deeper into the USSR airspace." It was shot down over Soviet territorial waters.[165]

The United States refuted the Soviet charges, in essence calling them lies, and denounced the USSR for attacking the plane over international waters. The United States went on to assert that the RB-47 was never closer than 30 miles to Soviet territory and was shot down over 200 miles from the Soviet border. The United States strongly denied that there was any connection between the U-2 and the RB-47 incidents and the effort to link the two by the Soviets was declared to be "completely without foundation." The United States asserted, furthermore, that the flight was "one of a ... series of electro magnetic research flights well known to the Soviet government to have taken place over a period of more than 10 years."

The United States demanded the immediate release of the two men rescued and the return of the pilot's body. Additionally, it reserved the right to seek compensation for the attack.

Security Council debate on the RB-47 incident was convened

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[165] Id.

on a Soviet complaint. The Soviets introduced a resolution calling for United Nations condemnation of the United States. The Soviet First Deputy Foreign Minister, after outlining the Soviet charges that the plane was shot down within Soviet territorial waters while on a mission to pinpoint Soviet missile and radar stations, warned that "this is not yet war, but it is preparation for war."[166]

The United States countered that the Soviet condemnation of the United States was designed to obscure its "criminal and piratical attack on the RB-47 over international waters."[167] The Security Council rejected the Soviet proposed condemnation of the United States for allegedly carrying out an espionage flight. The Council was also prevented by Soviet vetoes from calling for an impartial international investigation of the July 1 shooting or from requesting Red Cross contact with the 2 survivors held captive by the Soviets.

In an effort to remove a major obstacle to the renewal of high-level United States-Soviet negotiations, the Soviets on their own initiative freed the 2 airmen on January 25, 1961 and returned them to the United States on January 27, 1961. Both governments agreed neither would continue to demand redress or verification of its version of the facts.[168]

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[166] Id.

[167] Id. at 253.

[168] FACTS ON FILE at 33 (1961).

D. Attacks on Foreign Military Aircraft

Each of the following cases involves the downing of a non American military aircraft by the Soviet Union.

1. Swedish DC-3

On June 13, 1952 a Swedish military DC-3 plane disappeared during a flight over the Baltic Sea. A Swedish military rescue aircraft, a Catalina flying boat, was attacked by Soviet fighters during the rescue operation and forced to make a water landing where the crew was picked up by a passing German vessel. The Soviets charged the aircraft entered Soviet airspace and disobeyed repeated requests for it to land. The flying boat then allegedly opened fire on the Soviet fighters, which returned the fire in self-defense.

The Swedish Government demanded punishment of those responsible for the attacks and the taking of measures to prevent their recurrence. It also reserved the right to seek compensation and proposed that the dispute be referred to the ICJ for adjudication. The Swedish protest and this proposal were rejected by the Soviet Government.[169]

2. British Lincoln Bomber

On March 12, 1953 a British bomber on a training flight was shot down by Soviet fighters near the British-Soviet zonal boundary in Germany. The crew of seven perished. The Soviets

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[169] Lissitzyn, supra note 4, at 576.

charged that the bomber penetrated East German airspace and refused to comply with instructions to land. The bomber then opened fire on the Soviet fighters, which returned fire in self-defense. The British admitted that the bomber, through a navigational error, may have strayed into the Soviet zone, but asserted categorically that the bomber carried no ammunition and could not therefore have fired at the Soviets. Furthermore, the British Government claimed the bomber was over West Germany when it was destroyed.[170] The French and United States High Commissioners in Germany joined the British in protesting the attack.

IV. Chicago Convention

As previously stated, the initial arguments condemning the Soviet Union for its downing of KAL 007 were treaty-based, primarily relying on the provisions of the Chicago Convention of 1944.[171] However, by the express terms of the Convention regulations made by the ICAO are not binding.[172] For a recommended procedure to become law, it must be adopted

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[170] Id.

[171] The rules appear in Annex 2 (7th ed. 1981) of the Chicago Convention on International Civil Aviation, Dec. 7, 1944, reprinted in 22 I.L.M. at 1154. Communication signals are set forth in Appendix A to Annex 2: procedures for intercepting aircraft are described in Attachment A to Annex 2.

[172] Chicago Convention, art. 37.

through domestic legislation of the signatory states.[173] Nevertheless, the consistent reference to the practices enshrined in the treaty, as if they were binding, by all states involved would seem to indicate at a minimum it expresses the basic expectations of the international community as it relates to the treatment of intruding civil aircraft.[174]

The rules regarding interception of civil aircraft provide that "interception of civil aircraft should be avoided and should be undertaken only as a last resort. If undertaken, the interception should be limited to determining the identity of the aircraft and providing any navigational guidance necessary for the safe conduct of the flight."[175] Additionally, the rules state that "Intercepting aircraft should refrain from the use of weapons in all cases of interception of civil aircraft."[176]

As a direct result of the downing of KAL 007, the ICAO held an extraordinary session for the purpose of considering an amendment to the Chicago Convention specifically forbidding the use of weapons against civil aircraft.[177] The new Article

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[173] Hassan, F., A Legal Analysis of the Shooting of Korean Airlines Flight 007 by the Soviet Union, 49 Journal of Air L. and Com. at 577 (1984).

[174] Kotaite, A., Security of International Civil Aviation - Role of ICAO, ANNALS OF AIR AND SPACE LAW, vol. 7, at 95 (1982).

[175] Supra note 171, Annex 2 sec. 2.1.

[176] Id., sec. 7.1.

[177] Supra note 106.

3 bis reads as follows:

(a) The contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of the aircraft must not be endangered. This provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations.

(b) The contracting States recognize that every State, in the exercise of its sovereignty, is entitled to require the landing at some designated airport of a civil aircraft flying above its territory without authority or if there are reasonable grounds to conclude that it is being used for any purpose inconsistent with the aims of this Convention; it may also give such aircraft any other instructions to put an end to such violations. For this purpose, the contracting States may resort to any appropriate means consistent with relevant rules of international law, including the relevant provisions of this Convention, specifically paragraph (a) of this Article. Each contracting State agrees to publish its regulations in force regarding the interception of civil aircraft.

(c) Every civil aircraft shall comply with an order given in conformity with paragraph (b) of this Article. To this end each contracting State shall establish all necessary provisions in its national laws or regulations to make such compliance mandatory for any civil aircraft registered in that State or operated by a person having his principal place of business or permanent residence in that State. Each contracting State shall make any violation of such applicable laws or regulations punishable by severe penalties and shall submit the case to its competent authorities in accordance with its laws or regulations.

(d) Each contracting State shall take appropriate measures to prohibit the deliberate use of any civil aircraft registered in that State or operated by an operator who has his principal place of business or permanent residence in that State for any purpose inconsistent with the aims of this Convention. This provision shall not affect paragraph (a) or derogate from

paragraphs (b) and (c) of this Article."[178]

The expressed intention of the Assembly, when it voted unanimously to adopt Article 3 bis, was not to create a new rule of law but to clarify an existing one.[179]

Nevertheless, the Soviet Union has consistently maintained its actions in the downing of KAL 007 were consistent with its rights and obligations under the United Nations Charter. As discussed previously, it has also asserted its actions were in conformity with states' practice. This claim of lawfulness under international law, however, has not withstood review by the international community.[180]

V. United Nations Charter

The Mallisons assert that the minimum world legal order is "set forth in article 2(3) and (4), and article 51 of the United Nations Charter." These articles, they explain, represent "a codification of the pre-existing customary law concerning aggression and self-defense."[181] If this assertion is accurate then it may be presumed that any unilateral resort to the use of force purported to be in self-defense which does

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[178] International Civil Aviation Organization: Amendment of Convention on International Civil Aviation with Regard to Interception of Civil Aircraft, reprinted in 23 I.L.M. at 705 (1984).

[179] 38 ICAO Bull., June 1984, at 13.

[180] BRIERLY, J., THE LAW OF NATIONS, at 320 (5th ed. 1955).

[181] MALLISON, W.T. AND S.V., ARMED CONFLICT IN LEBANON, 1982: HUMANITARIAN LAW IN A REAL WORLD SETTING, at 13 (2nd ed. 1985).

not meet the legal requirements of self-defense threatens the disruption of the international legal order at its roots.

Article 2(3) states:

> All members shall settle their international disputes by peaceful means in such a manner that international peace and security are not endangered.

Paragraph (4) provides that:

> All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.

Article 51 reads as follows:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

The right to rely on self-defense reserved to each contracting party of the Charter may be viewed at least from two different perspectives. The Mallisons' view is that the elucidation of this right in Article 51 is in effect a restatement of the existing customary law of self-defense, whereas proponents of the strict interpretation theory of self-defense read article 51 in connection with article 2(3) and (4) as restricting the "inherent right" of self-defense

to situations where an armed attack has taken place.[182] The latter view narrowly confines defensive action to the methods enumerated in article 33 of the Charter "negotiation, enquiry, mediation, ... or other peaceful means," absent an armed attack. This view also supports the position that the failure of a state to avail itself of one of the aforementioned peaceful methods of dispute resolution is an important factor in assessing the legitimacy of a state's use of force.[183] This interpretation would by necessity rule out anticipatory self-defense as a viable option under international law.[184]

This restricted view of self-defense is outmoded, if it ever was in vogue. Current political realities are focused in bold relief by President Kennedy's address in the Cuban Missile Crises:

> "We no longer live in a world where only the actual firing of weapons represents a sufficient challenge to a nation's
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> security to constitute maximum peril. Nuclear weapons are so destructive and ballistic missiles are so swift that any substantially increased possibility of their use or any sudden change in their deployment may well be regarded

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[182] See also, Kunz, Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations, 41 Am. J. Int'l. L. 872 (1947), wherein the author asserts the right of self-defense exists only in the event of an armed attack; and McDougal and Feliciano, Law and Minimum World Public Order, at 237 (1963), wherein McDougal asserts the phrase 'if armed attack occurs'should not be read as meaning 'if and only if' an armed attack occurs.

[183] Higgins, The Legal Limits to the Use of Force by Sovereign States: United Nations Practice, Brit. Y. B. Int'l. L., at 295 (1961).

[184] Mallisons, supra note 181.

as a definite threat to peace."[185]

It may be argued that the traditional approach to self-defense did not entail the requirement to use peaceful means prior to resorting to force. Even so, one might assert the position that the historic notion of necessity implied the use of pacific means prior to resorting to force. Regardless, it seems fairly well established that at this point in time the legal requirements for the use of force in self-defense under customary law are: (1) the use of peaceful procedures, if they are available; (2) necessity; and (3) proportionality.[186] Anticipatory self-defense may be viewed as a limited subcategory of self-defense "which may only be employed when the evidence shows a threat of imminent armed attack and the necessity to act is overwhelming."[187]

The initial determination of whether the requirements for exercising the right of self-defense exist are unilaterally made by the state that uses it. However, this decision is subject to subsequent scrutiny by the international community.[188] This scrutiny serves the function of furthering the common interest in maintaining the minimum world legal

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[185] Dept. of State Bull., vol. 47, at 715 (1962).

[186] Mallisons, supra note 181; see also Mallison, W.T., Limited Naval Blockade or Quarantine - Interdiction: National and Collective Defense Claims Valid Under International Law, 31 Geo. Wash. L. R. 335-398 (1962).

[187] Id.

[188] Brierly, supra note 180.

order. Brierly presents it this way:

> The practice of states decisively rejects the view that a state need only declare its own action to be defensive for that action to be defensive as a matter of law...It is clear that the defensive or non-defensive character of any state's action is universally regarded as a question capable of determination by an objective examination of relevant facts.[189]

Normally, if an objective examination of relevant facts reveals that a state has committed an international wrong by using force in violation of the principles requiring it to use peaceful means, necessity, or proportionality, a corresponding claim for damages arises.[190]

The following section contrasts two international incidents in which the United States was involved to review what circumstances may give rise to the legitimate use of self-defense or anticipatory self-defense in conducting aerial intrusions and defending against them.

1. Penetrative Reconnaissance (U-2)

On May 1, 1960, Francis G. Powers, a citizen of the United States employed by the Central Intelligence Agency, was shot down without warning by the Soviet Union, while flying a U-2 spy plane over Soviet territory. Powers was arrested, tried and convicted of espionage by the Supreme Court of the Soviet Union and sentenced to ten years imprisonment.[191]

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[189] Id.

[190] WHITEMAN, M., DAMAGES IN INTERNATIONAL LAW, vol. 1 at 219 (1937).

[191] Lissitzn, O., Some Legal Implications of the U-2 and RB-47 Incidents, 56 Am. J. Int'l. L. at 135 (1962).

The United States did not protest the downing of the U-2 flight or the trial and conviction of Powers. The United States eventually admitted the U-2 flight was part of an ongoing program undertaken to gather military intelligence about the Soviet Union. This frank admission and lack of protest stands in sharp contrast to the strong remonstrances made by the United States in previous interceptions of American aircraft.

The U-2 incident coupled with the lack of protest against the downing of the plane suggests that in some circumstances no previous warning or order to land is required by international law before an aerial intruder may be shot down, even if the aircraft does not initiate an attack. If the military aircraft is deep inside national airspace, and its actions indicate the entry is intentional and purposeful, no warning appears to be necessary. This position is consistent with the United States' argument that an articulable security interest must be present before an intruding aircraft can be shot down.

The Soviet Union introduced a resolution before the Security Council requesting that the U-2 flight be characterized as an "aggressive act," but the draft resolution was rejected by a vote of 7 to 2 (Poland and the USSR), with 2 abstentions. The United States rebutted the Soviet charge of aggression by presenting, what appears to be a theory of anticipatory self-defense. The United States rationalized its

aerial reconnaissance of the Soviet Union by citing as its reasons for the flight Soviet secrecy, the danger of surprise attack from the Soviet Union, and the need to protect the non-communist world against such an attack. It also pointed to the numerous acts of espionage committed by Soviet agents in the United States and elsewhere in the free world. Nevertheless, the United States refrained from claiming a legal right to overfly the Soviet Union for reconnaissance purposes, and declared that the U-2 flights would not be resumed.[192] The Security Council, thereafter, issued a resolution to "strengthen international good will and confidence, based on the established principles of international law," and requested that member nations respect the territorial integrity of each state.[193]

2. Cuban Missile Crisis

In the U-2 incident, the United States unsuccessfully tried to rely on the principle of anticipatory self-defense as its justification for penetrative reconnaissance over the Soviet Union. The absence of any actual or threatened imminent danger prevented the United States from satisfying the requirements for anticipatory self-defense. The Cuban Missile Crisis of 1962 provides another example of anticipatory self-defense but with different results.

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[192] Wright, Q., Legal Aspects of the U-2 Incident, Am. J. Int'l. L., vol. 54, at 842 (1960).

[193] Id.

The defensive actions taken by the United States in 1962 subsequent to the establishment of offensive weapons in Cuba were limited to measures "proportionate to the threat and designed solely to prevent any further build-up of strategic missile bases in Cuba."[194] They were: (1) a quarantine-interdiction; and, (2) aerial surveillance of Cuba which included penetrative reconnaissance.

There are three principles in international law on which the United States' quarantine-interdiction could have been based. The first is the inherent right under customary international law of self-defense. The second legal justification is the treaty-based right to national self-defense found in Article 51. Thirdly, the quarantine can also be supported in conventional law as an exercise of the right of collective self-defense, through the Organization of American States (OAS), pursuant to the provisions of The Inter-American Treaty of Reciprocal Assistance of 1947 (Rio Treaty).[195]

The aerial surveillance of Cuba raises the question of the lawfulness of unconsented aerial intrusions conducted by military aircraft. Does a state, purporting to act in self-defense, in the absence of an armed attack on it, have the right to violate the national airspace of a foreign country?

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[194] Meeker, Defensive Quarantine and the Law, 57 Am. J. Int'l. L. at 515, 523 (1963).

[195] Fedele, supra note 137 and supra note 185.

The U-2 incident and the Cuban missile crises involved the intentional penetration of a foreign territory's airspace by the United States in peace time. Both seemingly violate the principle that a state has complete and exclusive sovereignty over its airspace.

In the U-2 incident, the United States was compelled to admit it had violated the territorial sovereignty of the Soviet Union since it lacked the consent of the Soviet Union to enter its airspace or the threat of an imminent attack to justify relying on self-defense. The Cuban missile crisis, however, presents a different scenario. Cuba was a state-party to the Rio Treaty which subjected it to measures authorized by a two-thirds vote of the member Stat .[196] OAS resolutions adopted by a two-thirds vote of the member states, therefore, constituted constructive consent by Cuba for any authorized action, thereby providing a legal justification for the penetrative reconnaissance by the United States.[197]

Even though the United States did not officially rely on the traditional doctrine of self-defense, the requirements for self-defense were present. The sudden secretive deployment by the Soviet Union of substantial offensive nuclear weapons to Cuba brought Latin America within the bull's eye of Soviet

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[196] Id.

[197] Dept. of State Bull., vol. 46, at 279 (1962); see also Resolution of Council of the Organization of American States, Meeting as the Provisional Organ of Consultation, October 23, 1962, Dept. of State Bull., vol. 47, at 722 (1962).

missiles as well as introduced a nuclear strike capability to an area in the United States' backyard, which until that moment had been free of nuclear weapons.

The aerial intrusions were necessary and proportional in that they were used only for the limited purpose of gathering evidence and information to support the quarantine, as opposed to targeting missile sites or launching an attack on Cuban military installations. This action by the United States established a legal framework for asserting that a State's penetration by its military aircraft of foreign territorial airspace in peace time is permissible under international law if the requirements of self-defense are met.

VI. The Law of State Responsibility

In a statement presented on August 4, 1989 to the Defense Policy Panel of the House Committee on Armed Services, meeting to discuss the legal aspects of compensating the families of the victims from the ill fated Iran Air Flight 655, Abraham D. Sofaer, Legal Advisor of the Department of State, took the position that the United States was under no legal obligation under international law to pay compensation. The pertinent parts of his statement are as follows:

> The President's decision to make ex gratia compensation has set in motion a process by which the United States will determine how, to whom, and under what conditions compensation is to be paid. I will briefly address the international aspects of the ex gratia payments we intend to make, including prior precedents for ex gratia payments, and what the process will be for making these payments...

Governing International Law

> Principles of international law that govern potential liability for injuries and property damage arising out of military operations are generally well-established.
>
> First, indemnification is not required for injuries or damage incidental to the lawful use of armed force.
> Second, indemnification is required where the exercise of armed force is unlawful.
> Third, states may, nevertheless, pay compensation ex gratia without acknowledging, and irrespective of legal liability...
>
> Offering compensation is especially appropriate where a civilian airliner has been shot down. The 1944 Convention on International Civil Aviation (the Chicago Convention), to which both the United States and Iran are parties, constitute a solemn undertaking to promote the safe and orderly development of international civil aviation. Indeed, the safety of international civil aviation is of the highest priority to the international community. When that safety is impaired and innocent lives are lost, nations should consider taking appropriate action to compensate those who suffer as a result...[198]

Professor Harold G. Maier in a statement before the Appropriations Subcommittee of the House Committee on Armed Services on August 3, 1988 in discussing the incident stated in part that:

> The legal questions that arise from the airliner incident engage what is called the law of state responsibility for injuries to aliens...
> ...If nations publicly acknowledge that they act or refrain from acting in accordance with a requirement of law, they incrementally strengthen an existing legal norm or contribute to the creation of a new one requiring or prohibiting such conduct. If they act merely ex gratia without acknowledging legal compulsion, then the act is not evidence of consent to a legal requirement to act in the way selected and does not, therefore, raise the inference of consent to be bound by an existing or newly emerging customary legal norm.
> The above summary indicates that the words used in

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[198] Supra note 115.

describing the reasons for which they act or refrain from acting are extremely important. It is for this reason, I am sure, that the executive branch, through the President, announced that the United States was contemplating payment to the survivors of those killed in the crash on humanitarian grounds only, not out of a sense of legal obligation.

It is, in my view, extremely important that in dealing with this issue members of Congress refrain, if possible, from couching whatever action they take as a response to a hypothetical international legal obligation. There is no evidence in this case that such an obligation exists under current international law, given the facts as we currently know them. The United States is on much firmer ground both from a humanitarian and a legal point of view if it makes whatever payments it finally approves with emphasis on humanitarian, rather than legal, motivations...[199]

A. Customary International Law

The American Law Institute provides the following rules concerning state responsibility:

"sec. 207. Attribution of Conduct to States

A state is responsibled for any violation of its obligations under international law resulting from action or inaction by

(a) the government of the state,
(b) the government or authorities of any political subdivision of the state, or
(c) any organ, agency, official, employee, or other agent of a government or of any political subdivision, acting within the scope of authority or under color of such authority.[200]

"sec. 701. Obligation to Respect Human Rights

A state is obligated to respect the human rights of persons subject to its jurisdiction

(a) that it has undertaken to respect by international agreement;

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[199] Lowenfeld, supra note 125.

[200] RESTATEMENT OF THE LAW THIRD, THE AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW: THE FOREIGN RELATIONS LAW OF THE UNITED STATES, vol. 1 at 96.

(b) that states generally are bound to respect as a matter of customary international law (sec. 702); and

(c) that it is required to respect under general principles of law common to the major legal systems of the world.

"sec. 711. State Responsibility for Injury to Nationals of Other States

A state is responsible under international law for injury to a national of another state caused by an official act or omission that violates

(a) a human right that, under sec. 701, a state is obligated to respect...

(b) a personal right that, under international law, a state is obligated to respect...

(c) ...[201]

The creation of an unreasonable risk of injury through a failure to exercise due care is addressed by Article 3 of the Harvard Draft Convention of 1961:

"1. An act or omission which is attributable to a State and causes an injury to an alien is 'wrongful,' as the term is used in this Convention:

"(a)...

"(b) if, without sufficient justification, it creates an unreasonable risk of injury through a failure to exercise due care;[202]

The Draft Convention also posed the question that a possible basis of absolute liability, or liability without fault, might someday exist for injury to aliens "caused by the violation of boundaries or extrahazardous activities."[203] The

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[201] Id., vol. 2, 152-174.

[202] Whiteman, supra note 38, at 760.

[203] Id. at 763.

Explanatory Note, as reproduced in Whiteman, commented in part:

> "... The exclusion of any separate provision on this subject is an intentional one. It has been thought unwise to deal with a subject of such extreme importance and complexity at a time when the cases of absolute liability which have thus far arisen under international law are comparatively trifling in number. The concept of absolute liability, or liability without fault, might possibly be applied to two general types of situation: The first of these would be a violation of the territory of State A by State B with resulting damage to property or life in State A, notwithstanding the fact that State B did not intend either the violation of territory or the resulting harm and that it took all possible precautions against the causing of injury. In terms of modern technology, a case of this sort might be imagined if a missile which were tested by State B should, without intent or negligence upon the part of State B, enter airspace of State A, fall to the ground, and cause injury there to nationals of State A. The second instance in which absolute liability might exist would be the conduct of extrahazardous activities with resultant harm to aliens. A test of nuclear weapons over the high seas which resulted in injuries to aliens might be said to represent a case of absolute liability, despite a lack of intent to cause harm and an absence of negligence in the conduct of the testing..."[204]

The following is a summary of the Fukuryu Maru incident. This case provides an example from the law of the sea governing the testing of nuclear weapons on the high seas that arguably resulted in an international obligation to pay compensation in the absence of an admission of fault.

> "On March 1, 1954, a small Japanese fishing vessel,the Fukuryu Maru No. 5, with a crew of 23, was fishing in the South Pacific at approximately Lat. 11 degrees 53' N and Long. 166 degrees 35' E. At 4:12 a.m. the crew observed 'a reddish brilliant light,' which 'gradually turned to white-yellow and again back to red and faded away; and about eight minutes late two blasts were heard in succession. The crew also reported that 'a cloud having

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[204] Id.

> the shape of a mushroom was seen in the direction where the light was first seen and this cloud started to expand covering the sky with dark clouds.' It was also reported that about three hours later 'ashes started to fall on the deck, which was turned white. 'About seven days later members of the crew 'began to feel painful irritations, from what looked like burns in the neck, face and ears.' The vessel returned at once to a Japanese port where the members of the crew were hospitalized, and it was determined that they had received a deposit of 'radio ash' after a nuclear test conducted by the Government of the United States at Bikini on March 1, 1954. The vessel had been fishing at a point 20 to 25 miles outside the previously announced dangerous zone."[205]

The Japanese Government requested that the United States pay compensation in the amount of 7 million dollars and accept legal responsibility for the damage resulting from the test. It asserted the United States was negligent in failing to take sufficient precautionary measures to prevent the injuries that occurred as a result of the nuclear blast.

After several months of negotiations, the United States Ambassador presented to the Japanese Deputy Minister and Foreign Minister a note dated January 4, 1955 which stated in part:

> I now desire to inform Your Excellency that the Government of the United States of America hereby tenders, ex gratia, to the Government of Japan, without reference to the question of legal liability, the sum of two million dollars for purposes of compensation for the injuries or damages sustained as a result of nuclear tests in the Marshall Islands in 1954.
>
> The Government of the United States of America understands that the tendered sum will be distributed in such an equitable manner as may be determined in the some discretion of the Government of Japan, and also wishes to observe that this sum includes provision for a solatium on behalf of each of the Japanese fishermen involved and for the claims advanced by the Government of Japan for

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[205] Id. at 764.

their medical and hospitalization expenses.

It is the understanding of the Government of the United States of America that the Government of Japan, in accepting the tendered sum of two million dollars, does so in full settlement of any and all claims against the United States of America or its agents, nationals, or juridical entities, on the part of Japan and its nationals and juridical entities for any and all injuries, losses, or damages arising out of the said nuclear tests.[206]

The United States' comment that the Japanese acceptance is in full settlement of any claims would appear to be inconsistent with the United States' position that no liability exists.

B. Excessive use of force

The following case provides an analogy from the law of the sea that involves the creation of an international obligation to pay compensation for the excessive use of force.

The "I'm Alone" case involved a dispute between Canada and the United States arising out of the sinking of a Canadian registered, American citizen controlled, rum-running vessel. A Special Agreement, the Convention of January 23, 1924 between the United States and Great Britain,[207] permitted the search and seizure by the United States of British vessels suspected of liquor smuggling, including the use of necessary and reasonable force for the purpose of effecting a boarding, search, seizure, and bringing into port the suspected vessel; and if sinking should occur incidentally, the pursuing vessel

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[206] Dept. of State Bull., vol. 32, at 90 (1955).

[207] Also styled the Convention between the United States of America and Great Britain to Aid in the Prevention of the Smuggling of Intoxicating Liquors into the United States.

might be blameless. The United States, however, in its answer to the Canadian complaint admitted intentionally sinking the suspected vessel.

The hot pursuit of the I'm Alone commenced inside a twelve mile area off the coast of the United States established by Congress under a revenue law and was terminated 200 miles from the Louisiana coast in the Gulf of Mexico. The commanding officer of the Dexter, an American coast guard cutter, ordered the I'm Alone to stop and warned the ship skipper that it would be sunk unless it obeyed the order to stop. Warning shots were fired across the vessel; it failed to stop and it was sunk.

Commissioners appointed to hear the case raised the following question among others:

> The question is whether, in the circumstances, the Government of the United States was legally justified in sinking the I'm Alone.

The answer they arrived at was that the sinking was under the circumstances illegal:

> "It will be recalled that the I'm Alone was sunk on the 22nd day of March, 1929, on the high seas, in the Gulf of Mexico, by the United States revenue cutter Dexter. By their interim report the Commissioners found that the sinking of the vessel was not justified by anything in the Convention. The Commissioners now add that it could not be justified by any principle of international law."[208]

VII. United States-Union of Soviet Socialist Republics Agreement

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[208] The I'm Alone, 1935, III U.N. Rep. Int'l. Arb. Awards 1609.

On June 12, 1989 Admiral William J. Crowe Jr., chairman of the Joint Chiefs of Staff, United States and his Soviet counterpart, General Mikhail A. Moiseyev, Soviet chief of staff (the head of the Soviet armed forces) signed an unprecedented agreement[209]that is designed in part to prevent the destruction of military aircraft which unintentionally violate the Soviet border. The pact is officially titled the "Agreement on the Prevention of Dangerous Military Activities," and takes effect on January 1, 1990 (see Annex B).[210]

VIII. Conclusion

Grotius stated that "Fault creates the obligation to make good the loss."[211] Correspondingly, states have generally conducted international relations under the virtually unassailable principle that where there is no fault, there is no obligation to pay compensation, even though injury to persons or damage to property may result from a particular state action.

It follows to reason that any argument that advances the proposition that customary law, as evidenced by the practice of states, may legally bind a state in the absence of fault

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[209] The Washington Post, June 13, 1989 at A 22; see also Navy Times, June 26, 1989 at 10.

[210] Id.

[211] Whiteman, supra note 190, at 829.

is delicate and must be advanced with caution. Nevertheless, in the area of aerial intrusions a strong argument exists that liability without fault is the appropriate principle to be applied when a civilian airliner is shot down while engaged in regularly scheduled air transport, irrespective of whether the downing occurs in time of peace or combat.

The determination of fault is usually tied to an accumulation of evidence for the purpose of establishing blame. Blame is immaterial in a situation such as this, since it can almost never be attributed to the innocent passengers on board the aircraft. The argument advanced by the State Department that but for Iran's refusal to accept the Security Council resolution calling for a cease-fire, the tragedy would not have happened reminds the listener of the old adage "for want of a nail the battle was lost." In other words, the argument removes the cause of the accident too far in time and place from the actual incident itself. In the public courtroom of world opinion, the precedents established by the aforementioned incidents involving the destruction of civilian airliners engaged in regularly scheduled international transportation, indicate that there exists an expectation of compensation, irrespective of the reasons why the airliner was shot down.

Professor Maier correctly notes that states may incrementally strengthen or weaken existing legal norms by public declarations of intent to act or refrain from acting

for a certain reason. However, any inference that the formation of customary law is solely dependent on the unilateral pronouncement of a given state is misleading. For example, each of the aforementioned states that attempted to justify its destruction of an intruding civilian airliner on the basis of an articulated security iterest was, nevertheless, rebuffed by the international community. In fact, the United States led the attack in pointing out Russia's obligations under international law in spite of Soviet claims to the contrary. Time and time again the United States has been in the vanguard of condemning states which shoot down civilian airliners, with the exception of the Israeli downing of the Libyan airliner, and articulating the need for states to use the ICJ as an impartial arbiter of incidents involving the destruction of aerial intruders in peace time. The Israeli exception, of course, raises the question of the United States impartiality or lack thereof.

The United States has championed the cause of adequate compensation in these incidents, and brushed aside attempts by states to make excuses for the downing of civil aircraft, particularly, on the basis of factual distinctions. The United States has voiced these opinions even when civilian airliners where downed during times of combat, with one notable exception, the 1953 downing of a Soviet civilian airliner during the Korean conflict. However, after initially refusing to accept the Soviet claim, in 1954 the United States agreed

to submit to the jurisdiction of the ICJ, if the Soviets would agree to negotiate in good faith on other incidents involving attacks on American military aircraft. This offer was made even though the United States considered the Soviet claims "to be completely without foundation." It was a mistake for the United States to reject the Soviet's claim for compensation in the first instance without offering to negotiate, nor should human tragedy ever be used as a bargaining chip, but this incident does illustrate the United States' historical push to get the law firmly established by an authoritative ruling by the ICJ. Unfortunately, the Russians did not accept the belated invitation to submit to the jurisdiction of the court, probably in large part due to the desire not to be held accountable for the numerous shooting incidents involving unintentional aerial intrusions along its border.

Now, for the first time in history the United States has the opportunity to demonstrate that its challenge to the Russians in 1954 was not political posturing, and that its real interest in getting a case involving the destruction of an aerial intruder before the ICJ is the impartial development and application of customary law. Iran has thrown down the gauntlet and challenged the United States to play by its own rules, and to date the United States has refused to take the challenge.

The United States issued a Notice to Airmen or NOTAM

regarding flights within the Persian Gulf prior to the incident involving the air bus. That warning probably satisfied the warning requirement articulated in the Corfu Channel Case. Also, there appears to be a strong argument that the United States satisfied the traditional requirements for self-defense prior to resorting to the use of force in terminating IR655. It is however equally evident, as in the case of the Fukuryu Maru, the warnings issued by the United States were inadequate. It should also be remembered that the United States in its Memorial against Bulgaria implied, in its description of the safe alternative which must be offered to an intruding civilian airliner, that the overflown state must communicate with the aircraft on an international radio frequency used by the airplane in flight. This might lead an impartial observer to conclude that the United States was in the best position to arrange for its warships to be able to monitor civil air traffic control frequencies for flight identification in an area where there were civilian airports and civilian aircraft engaged in regularly scheduled air transportation.

Mr. Sofaer's comment that compensation paid on "an ex gratia basis is within the discretion of the state offering the payments" fails to explain that those payments are subject to negotiation. No state is bound by international law to accept another state's unilateral determination of the amount of compensation. Japan accepted the United States' offer of

compensation in the Fukuryu Maru, but as in the case of the United States' refusal of the Bulgarian settlement offer, Iran has so far refused to acquiesce to the United States' settlement offer.[212] The decision by the United States to offer what appears to be a "very large" settlement does not resolve the issue of liability, since the payment offer seeks to effect an end run around the state of nationality of the majority of the victims. True, the amount offered is very generous when compared to amounts paid in previous incidents. Yet, the sheer size of the award contributes to the same uneasy feeling one gets when you listen to Mr. Sofaer explain that the United States has no legal responsibility to pay any compensation, since the Iranians were at fault for letting this regularly scheduled, twice weekly flight, traveling in an established air corridor, enter a combat zone.

Taking the unfounded leap of faith that civil authorities in charge of monitoring air traffic in Iran were privy to military operations going on at that moment in the Gulf, why would they think the flight would be in any danger? The skirmish was between Iranian gun-boats and American warships, not aircraft.

What is the basis of such a large award? How was it assessed? The State Department asserts it is not related to

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[212] Washington Post, July 18, 1989, A14. The United States offered compensation of $100,000 to $250,000 for each of the 290 passengers and crew members killed.

the compensation paid by Iraq for the attack on the USS Stark?[213] It exceeds the limits of the Warsaw Convention. It has the potential of being seven times greater than any previous award in an incident of this type, and it is not based on the findings of a claims commission. It does not even appear to be based on any domestic rules for determining damages in tort cases. Furthermore, the issue of compensation due Iran, if any, has not been addressed. This may be one of the more unpalatable prospects facing the United States that is preventing us from accepting the jurisdiction of the ICJ.

Finally, one must ask why does the United States insist on having each person who receives an "ex gratia" payment as a result of this incident sign a release?[214] Mr. Sofaer says it is standard practice by the United States Government. However, the decision to request that a release be signed might be interpreted as tacit acquiesence that a legal obligation exists, and that public pronouncements to the contrary are primarily face saving.

Iran has consistently failed to comply with the behavior expected of a responsible member of the world community. They failed to protect our embassy and supported the taking of hostages in 1979. Yet, in spite of their lawlessness, the

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[213] Id.; Iraq paid $700,000 for each crew member killed in the May, 1987 attack on the USS Stark. The United States noted the Stark had identified itself twice to the Iraqi pilot and had taken no hostile action against the plane.

[214] Supra note 115.

United States should, in the interest of the long term protection of international civil air transportation, indicate its willingness to submit to the jurisdiction of the ICJ. This could be done in the form of a compromis, or an agreement submitting certain issues or principles of law to the court for resolution, thereby limiting the issues to be addressed by the court and allowing the parties to avoid having the court rule on any issue considered too politically sensitive. Negotiations to establish the appropriate issues could probably be conducted through the Swiss Government. If Iran refused to negotiate, the United States would be viewed as making a reasonable attempt to demonstrate that its vocalizations of international law in this area are consistent with its practice, even when it stands the possibility of obtaining a politically distasteful ruling from the ICJ.

The new military pact between the United States and the Soviet Union would also serve as an historic move that has the potential to strengthen existing customary law in the area of aerial intrusions. This agreement represents the first time the USSR has committed itself to a set protocol that establishes a presumption that aerial intrusions by any foreign states' military aircraft are non hostile, and that the use of force against military aerial intruders will be avoided. The agreement obligates the parties to take prescribed peaceful measures, without resort to the threat or use of force, and sets up a methodology for establishing radio

contact for communicating to intruders or special procedures to be used in the event radio communication fails or is ineffective due to a language barrier. This agreement should have the effect of incrementally strengthening the influence of the Chicago Convention, since it incorporates the signal procedures and phrases for intercepting aircraft used in Rules of the Air, Annex 2. And it may also be the precursor to a new international order governing the creation of bilateral treaties as a means for ensuring the safety of military aircraft in peace time. The fact that the United States and the Soviet Union were able to sit down at the bargaining table and find common ground, by articulating a common interest and common set of values protecting human life, bodes well for the safety of air transportation. Although the convention does not cover civilian aircraft, it is certainly reasonable to hope that the Soviet's decision to forego the use of force against military aerial intruders will have an umbrella effect which will shelter unintentional intrusions by civilian aircraft.

Previous incidents involving the destruction of American military aircraft flying in the vicinity of the Soviet border gave American airmen just reason for being nervous in the event a mission took them near the Soviet border. This agreement should allow them to relax a little, but not too much, since it should be kept in mind that everyone thought the Chicago Convention clearly prohibited the downing of civil aircraft prior to KAL 007. Unfortunately, the only way the

United States will be certain the Soviets interpret this agreement in the same way we do is to wait for the inevitable incident that puts their interpretation to the test.

Appendix A

EXCERPTS FROM REPORT OF ICAO FACT-FINDING INVESTIGATION PURSUANT TO DECISION OF ICAO COUNCIL OF JULY 14, 1988

(Re: Iran Air 655 and U.S.S. Vincennes)

3. Conclusions

3.1 Findings

3.1.1 The flight crew of flight IR655 was properly certificated and qualified for the scheduled international passenger flight in accordance with existing regulations. There was no indication that the flight crew may not have been physically or psychologically fit.

3.1.2. The aircraft was properly certificated, equipped and maintained in accordance with existing regulations and approved procedures. The aircraft was serviceable when dispatched from Bandar Abbas.

3.1.3. There was no indication of failure during flight in the equipment of the aircraft including the communications and navigation equipment.

3.1.4. The wreckage including the digital flight data recorder and the cockpit voice recorder had not been recovered by 16 October 1988.

3.1.5. On 3 July 1988 the Bandar Abbas VORTAC was operating normally, although its flight check had expired on 21 May 1988. A flight check carried out on 30 July 1988 found the facility operational without discrepancy.

3.1.6. On 3 July 1988 no "red alert" status was in effect and the ATC units at Tehran and Bandar Abbas airport terminal 20 minutes after the scheduled time.

3.1.7. Flight IR655 departed Bandar Abbas airport terminal 20 minutes after the scheduled time.

3.1.8. The flight crew had correctly selected SSR mode A code 6760. SSR mode C (automatic pressure altitude transmission) was functioning.

3.1.9. After take-off the aircraft climbed straight ahead enroute and the climb profile was normal. It followed airway A59 and remained well within its lateral limits. The

use of FL140 or FL160 was normal for flights on airways A59 and A59W from Bandar Abbas to Dubai.

3.1.10. The aircraft weather radar was probably not operated during the flight nor would normal procedures have required its operation in the prevailing weather conditions. The radio altimeters were probably functioning throughout the flight.

3.1.11. No electronic emissions from the aircraft, other than SSR responses, were detected by United States warships.

3.1.12. The flight crew carried out normal VHF communications with ATC units concerned.

3.1.13. Apart from the capability to communicate on the emergency frequency 121.5 MHz, United States warships were not equipped to monitor civil ATC frequencies for flight identification purposes.

3.1.14. The flight crew was aware of the Iran Air company instruction to monitor frequency 121.5 MHz at all times while operating in the Gulf area.

3.1.15. Four challenges addressed to an unidentified aircraft (IR655) were transmitted by United States warships on frequency 121.5 MHz (three from USS Vincennes and one from USS Sides).

3.1.16. There was no response to the four challenges made on 121.5 MHz, either by radio or by a change of course. This indicated that the flight crew of IR655 either was not monitoring 121.5 MHz in the early stages of flight, or did not identify their flight as being challenged.

3.1.17. The aircraft was not equipped to receive communications on the military air distress frequency 243 MHz.

3.1.18. The civil ATS route structure and major airports in the Gulf area were displayed on the AEGIS large screen displays in the Combat Information Centre. The information did not include all types of promulgated airspace, in particular airway widths, low-level helicopter routes, standard departure and arrival routes and airspace restrictions. The information displayed together with aircraft tracks in real time appeared adequate for the projection of a two-dimensional air traffic situation. However, the absence of altitude information on the large screen displays did not allow ready assessment of flight profiles in three dimensions.

3.1.19. Information on civil flight schedules was available in the Combat Information Centre of USS Vincennes,

However, in the form presented, it was of extremely limited value for the determination of estimated time of overflight of individual aircraft. Flight plan information and flight progress data, including information on assigned SSR mode A codes, were not available to assist in flight identification.

3.1.20. There was no co-ordination between United States warships and the civil ATS units responsible for the provision of air traffic services within the various flight information regions in the Gulf area.

3.1.21. Iran Air flight crews were well versed with the use of English and the majority of communications between IR655 and Bandar Abbas TWR/APP and Tehran ACC were conducted in that language.

3.1.22. The contents of the challenges and warnings issued to IR655 on 121.5.MHz varied from one transmission to the next. It is uncertain whether the flight crew would have been able to rapidly and reliably identify their flight as the subject of these challenges and warnings. Although course information given could have been recognizable to the flight crew of IR655 , speed information given on the basis of ground speed may not have been recognizable by the pilot. Position information in geographical co-crdinates was not a practical method to establish identification. The SSR mode A code displayed by IR655 could have been immediately recognizable to the flight crew, but was given only in the final challenge.

3.1.23. The initial assessment by USS Vincennes that the radar contact (IR655) may have been hostile, was based on:

a) the fact that the flight had taken off from a joint civil/military aerodrome;

b) the availability of intelligence information on Iranian F-14 deployment to Bandar Abbas and the expectation of hostile activity;

c) the possibility of Iranian use of air support in the surface engagements with United States warships;

d) the association of the radar contact with an unrelated IFF mode 2 response; and

e) the appearance of an unidentified radar contact that could not be related to a scheduled time of departure of a civil flight.

3.1.24. The continued assessment as a hostile military aircraft by USS Vincennes and the failure to identify it as a civil flight were based on the following:

a) the radar contact had already been identified and labelled as an F-14;

b) the lack of response from the contact to the

challenges and warnings on frequencies 121.5 MHz and 243 Hz;

c) no detection of civil weather radar and radio altimeter emissions from the contact;

d) reports by some personnel on USS Vincennes of changes in flight profile (descent and acceleration) which gave the appearance of maneuvering into an attack profile; and

e) the radar contact was tracked straight towards USS Montgomery and USS Vincennes on a course slightly diverging from the centreline of airway A59.

3.1.25. Reports of changes in flight profile from climb to descent and acceleration were heard in the Combat Information Centre of USS Vincennes, as recalled by a number of crew members including the operators who at that time issued the challenges on 121.5 MHz and 243 MHz containing correct AEGIS system information.

3.1.26. USS Vincennes AEGIS system contained and displayed correctly the IFF mode and code, and the altitude and speed information of the contact (IR655). The AEGIS system recorded a flight profile consistent with a normal climb profile of an Airbus A300.

3.2. Causes

3.2.1. The aircraft was perceived as a military aircraft with hostile intentions and was destroyed by two surface-to air missiles.

3.2.2. The reasons for misidentification of the aircraft are detailed in the findings (paragraphs 3.1.23 and 3.1.24).

4. Safety Recommendations

4.1 In areas where military activities potentially hazardous to civil flight operations aircraft take place, optimum functioning of civil/military co-ordination should be pursued. When such military activities involve States not responsible for the provision of air traffic services in the area concerned, civil/military co-ordination will need to include such States. To this end:

a) Military forces should, initially through their appropriate State authorities, liaise with States and ATS units in the area concerned.

b) Military forces should be fully informed on the extent of all promulgated routes, types of airspace, and relevant regulations and restrictions.

c) Advance information on scheduled civil flights should be made available to military units including

the allocated SSR mode A codes when available.

d) Direct communications between military units and the appropriate ATS units, not using regular ATC or the emergency frequencies, should be established for the exchange of real time flight progress information, delays and information on non-scheduled flights.

e) Military units should be equipped to monitor appropriate ATC frequencies to enable them to identify radar contacts without communication.

f) If challenges by military units on the emergency frequency 121.5 MHz become inevitable, these should follow an agreed message format with content operationally meaningful to civil pilots.

g) In areas where such military activities occur, information necessary for the safety, regularity and efficiency of air navigation should be promulgated in a suitable form. The information should contain the type of challenges that might be transmitted, and should include instructions to pilots of civil aircraft to monitor the emergency frequency 121.5 MHz.

h) To assist identification by electronic emissions, pilots of civil aircraft should ensure continuous operation of airborne weather radars and radio altimeters.

AGREEMENT
BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE UNION OF SOVIET SOCIALIST REPUBLICS ON THE PREVENTION OF DANGEROUS MILITARY ACTIVITIES

The Government of the United States of America and the Government of the Union of Soviet Socialist Republics, hereinafter referred to as the Parties,

Confirming their desire to improve relations and deepen mutual understanding,

Convinced of the necessity to prevent dangerous military activities, and thereby to reduce the possibility of incidents arising between their armed forces,

Committed to resolving expeditiously and peacefully any incident between their armed forces which may arise as a result of dangerous military activities,

Desiring to ensure the safety of the personnel and equipment of their armed forces when operating in proximity to one another during peacetime, and

Guided by generally recognized principles and rules of international law,

Have agreed as follows:

ARTICLE I

For the purposes of this Agreement:

1. "Armed forces" means, for the United States of America: the armed forces of the United States, including the United States Coast Guard; for the Union of Soviet Socialist Republics: the armed forces of the USSR, and the Border Troops of the USSR.

2. "Personnel" means any individual, military or civilian, who is serving in or is employed by the armed forces of the Parties.

3. "Equipment" means any ship, aircraft or ground hardware of the armed forces of the Parties.

4. "Ship" means any warship or auxiliary ship of the armed forces of the Parties.

5. "Aircraft" means any military aircraft of the armed forces of the Parties, excluding spacecraft.

6. "Ground hardware" means any materiel of the armed forces of the Parties designed for use on land.

7. "Laser" means any source of intense, coherent, highly directional electromagnetic radiation in the visible, infrared, or ultraviolet regions that is based on the stimulated radiation of electrons, atoms or molecules.

8. "Special Caution Area" means a region, designated mutually

by the Parties, in which personnel and equipment of their armed forces are present and, due to circumstances in the region, in which special measures shall be undertaken in accordance with this Agreement.

9. "Interference with command and control networks" means actions that hamper, interrupt or limit the operation of the signals and information transmission means and systems providing for the control of personnel and equipment of the armed forces of a Party.

ARTICLE II

1. In accordance with the provisions of this Agreement, each Party shall take necessary measures directed toward preventing dangerous military activities, which are the following activities of personnel and equipment of its armed forces when operating in proximity to personnel and equipment of the armed forces of the other Party during peacetime:

(a) Entering by personnel and equipment of the armed forces of one Party into the national territory of the other Party owing to circumstances brought about by force majeure, or as a result of unintentional actions by such personnel;

(b) Using a laser in such a manner that its radiation

could cause harm to personnel or damage to equipment of the armed forces of the other Party;

(c) Hampering the activities of the personnel and equipment of the armed forces of the other Party in a Special Caution Area in a manner which could cause harm to personnel or damage to equipment; and

(d) Interfering with command and control networks in a manner which could cause harm to personnel or damage to equipment of the armed forces of the other Party.

2. The Parties shall take measures to ensure expeditious termination and resolution by peaceful means, without resort to the threat or use of force, of any incident which may arise as a result of dangerous military activities.

3. Additional provisions concerning prevention of dangerous military activities and resolution of any incident which may arise as a result of those activities are contained in Articles III, IV, V and VI of this Agreement and the Annexes thereto.

ARTICLE III

1. In the interest of mutual safety, personnel of the armed forces of the Parties shall exercise great caution and prudence while operating near the national territory of the other Party.

2. If, owing to circumstances brought about by force majeure or as a result of unintentional actions, as set forth in Article II, subparagraph 1(a) of this Agreement, personnel and equipment of the armed forces of one Party enter into the national territory of the other Party, such personnel shall adhere to the procedures set forth in Annexes 1 and 2 to this Agreement.

ARTICLE IV

1. When personnel of the armed forces of one Party, in proximity to personnel and equipment of the armed forces of the other Party, intend to use a laser and that use could cause harm to personnel or damage to equipment of the armed forces of that other Party, the personnel of the armed forces of the Party intending such use of a laser shall attempt to notify the relevant personnel of the armed forces of the other Party. In any case, personnel of the armed forces of the Party intending use of a laser shall follow appropriate safety measures.

2. If personnel of the armed forces of one Party believe that personnel of the armed forces of the other Party are using a laser in a manner which could cause harm to them or damage to their equipment, they shall immediately attempt to establish communications to seek termination of such use. If the personnel of the armed forces of the Party having received such notification are actually using a laser in proximity to the area indicated in the

notification, they shall investigate the relevant circumstances. If their use of a laser could in fact cause harm to personnel or damage to equipment of the armed forces of the other Party, they shall terminate such use.

3. Notifications with respect to the use of a laser shall be made in the manner provided for in Annex 1 to this Agreement.

ARTICLE V

1. Each Party may propose to the other Party that the Parties agree to designate a region as a Special Caution Area. The other Party may accept or decline the proposal. Either Party also has the right to request that a meeting of the Joint Military Commission be convened, in accordance with Article IX of this Agreement, to discuss such a proposal.

2. Personnel of the armed forces of the Parties present in a designated Special Caution Area shall establish and maintain communications, in accordance with Annex 1 to this Agreement, and undertake other measures as may be later agreed upon by the Parties, in order to prevent dangerous military activities and to resolve any incident which may arise as a result of such activities.

3. Each Party has the right to terminate an arrangement with respect to a designated Special Caution Area. The Party intending to exercise this right shall provide timely notification of such

intent to the other Party, including the date and time of termination of such an arrangement, through use of the communications channel set forth in paragraph 3 of Article VII of this Agreement.

ARTICLE VI

1. When personnel of the armed forces of one Party, in proximity to personnel and equipment of the armed forces of the other Party, detect interference with their command and control networks which could cause harm to them or damage to their equipment, they may inform the relevant personnel of the armed forces of the other Party if they believe that the interference is being caused by such personnel and equipment of the armed forces of that Party.

2. If the personnel of the armed forces of the Party having received such information establish that this interference with the command and control networks is being caused by their activities, they shall take expeditious measures to terminate the interference.

ARTICLE VII

1. For the purpose of preventing dangerous military activities, and expeditiously resolving any incident which may arise as a result of such activities, the armed forces of the Parties shall establish and maintain communications as provided for in Annex 1 to this Agreement.

2. The Parties shall exchange appropriate information on instances of dangerous military activities or incidents which may arise as a result of such activities, as well as on other issues related to this Agreement.

3. The Chairman of the Joint Chiefs of Staff of the United States shall convey information referred to in paragraph 2 of this Article through the Defense Attache of the Union of Soviet Socialist Republics in Washington, D.C. The Chief of the General Staff of the Armed Forces of the Union of Soviet Socialist Republics shall convey such information through the Defense Attache of the United States in Moscow.

ARTICLE VIII

1. This Agreement shall not affect the rights and obligations of the Parties under other international agreements and arrangements in force between the Parties, and the rights of individual or collective self-defense and of navigation and overflight, in accordance with international law. Consistent with the foregoing, the Parties shall implement the provisions of this Agreement, taking into account the sovereign interests of both Parties.

2. Nothing in this Agreement shall be directed against any Third Party. Should an incident encompassed by this Agreement occur in the territory of an ally of a Party, that Party shall have the right to consult with its ally as to appropriate measures to be taken.

ARTICLE IX

1. To promote the objectives and implementation of the provisions of this Agreement, the Parties hereby establish a Joint Military Commission. Within the framework of the Commission, the Parties shall consider:

(a) Compliance with the obligations assumed in this Agreement;

(b) Possible ways to ensure a higher level of safety for the personnel and equipment of their armed forces; and

(c) Other measures as may be necessary to improve the viability and effectiveness of this Agreement.

2. Meetings of the Joint Military Commission shall be convened annually or more frequently as may be agreed upon by the Parties.

ARTICLE X

1. This Agreement, including its Annexes, which form an integral part thereof, shall enter into force on January 1, 1990.

2. This Agreement may be terminated by either Party six months after written notice thereof is given to the other Party.

3. This Agreement shall be registered in accordance with Article 102 of the Charter of the United Nations.

Done at Moscow on the twelfth of June, 1989, in two copies, each in the English and Russian languages, both texts being equally authentic.

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA

Chairman of the Joint Chiefs of Staff

FOR THE GOVERNMENT OF THE UNION OF SOVIET SOCIALIST REPUBLICS

Chief of the General Staff of the Armed Forces of the USSR

ANNEX 1

PROCEDURES FOR ESTABLISHING AND MAINTAINING COMMUNICATIONS

Section I

Communications Channels

For the purpose of implementing this Agreement, the armed forces of the Parties shall provide for establishing and maintaining, as necessary, communications at the following levels:

(a) The Task Force Commander of the armed forces of one Party present in a Special Caution Area and the Task Force Commander of the armed forces of the other Party in the same Area;

(b) Commander* of a ship, aircraft, ground vehicle or ground unit of the armed forces of one Party and the Commander* of a ship, aircraft, ground vehicle or ground unit of the armed forces of the other Party; and

(c) Commander* of an aircraft of the armed forces of one Party and an air traffic control or monitoring facility of the other Party.

* "Commander" means the individual with authority to command or lead a ship, aircraft, ground vehicle or ground unit.

Section II

Radio Frequencies

1. To establish radio communication, as necessary, the following frequencies shall be used:

(a) between aircraft of the Parties or between an aircraft of one Party and an air traffic control or monitoring facility of the other Party: on VHF band frequency 121.5 MHz or 243.0 MHz, or on HF band frequency 4125.0 KHz (alternate 6215.5 KHz); after initial contact is made, the working frequency 130.0 MHz or 278.0 MHz, or 4125.0 KHz should be used;

(b) between ships of the Parties and ship-to-shore: on VHF band frequency 156.8 MHz, or on HF band frequency 2182.0 KHz;

(c) between a ship of one Party and an aircraft of the other Party: on VHF band frequency 121.5 MHz or 243.0 MHz; after initial contact is made, the working frequency 130.0 MHz or 278.0 MHz shall be used; and

(d) between ground vehicles or ground units of the armed forces of the Parties: on VHF band frequency 44.0 MHz (alternate 46.5 MHz), or on HF band frequency 4125.0 KHz (alternate 6215.5 KHz).

2. The Parties agree to conduct necessary testing to ensure reliability of the communications channels agreed by the Parties.

Section III

Signals and Phrases

1. The Parties recognize that the lack of radio communication can increase the danger to the personnel and equipment of their armed forces involved in any incident which may arise as a result of dangerous military activities. Personnel of the armed forces of the Parties involved in such incidents who are unable to establish radio communication, or who establish radio communication but cannot be understood, shall try to communicate using those signals referred to in this Section. In addition, such personnel shall attempt to establish communications with other personnel of their armed forces, who in turn shall take measures to resolve the incident through communications channels set forth in this Agreement.

2. Ship-to-ship and ship-to-shore communications shall be conducted using signals and phrases as set forth in the International Code of Signals of 1965 and the Special Signals developed in accordance with the Agreement between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics on the Prevention of Incidents On and Over the High Seas of 1972. Aircraft-to-aircraft communications shall be conducted using signals and phrases for intercepting and

intercepted aircraft contained in the Rules of the Air, Annex 2 to the 1944 Convention on International Civil Aviation (Chicago Convention). The additional signals and phrases contained in paragraph 4 of this Section may also be used.

3. Whenever aircraft of the Parties come into visual contact with each other, their aircrews shall monitor the frequency 121.5 MHz or 243.0 MHz. If it is necessary to exchange information, but communications in a common language are not possible, attempts shall be made to convey essential information and acknowledgement of instructions by using phrases referred to in paragraphs 2 and 4 of this Section. If radio communication is not possible, then visual signals shall be used.

4. The following table contains additional signals and phrases for communications between aircraft, ships, ground vehicles or ground units, in accordance with this Agreement:

ADDITIONAL SIGNALS, PHRASES AND APPROPRIATE RESPONSES

	A. MEANING OF SIGNAL/PHRASE	B. VISUAL SIGNALS FOR AIRCRAFT	C. PHRASE	D. PRONUNCIATION	E. APPROPRIATE RESPONSE
1	You are in close proximity to our national territory.	Day and Night - The intercepting aircraft, flying abeam and parallel to the intercepted aircraft, rocking wings, and flashing navigation lights at slow regular intervals, followed by a series of shallow bank "S" turns, in the horizontal plane, approximately 10 degrees either side of line of flight	"CLOSE TO TERRITORY"	CLOSE-TO TERR-I-TORY	Intercepted aircraft turns away from national territory.
2	You have entered into our national territory.	Day and Night - The intercepting aircraft, flying abeam and parallel to the intercepted aircraft, rapidly flashing navigation lights while rocking wings, followed by a shallow turn executed in the horizontal plane, with a 15-20 degree bank in the direction of the intercepted aircraft. The approach shall be accomplished with great caution and not closer than one wing span. Repeat until intercepted aircraft acknowledges or radio contact is established.	"TERRITORY ENTERED"	TERR-I-TORY EN-TERED	Intercepted aircraft shall follow the appropriate instructions of the intercepting aircraft.
3	I need to land.	Day and Night - The aircraft flashes its navigation lights repeatedly and rapidly while rocking wings, followed by a gentle porpoising of the aircraft.	"REQUEST LANDING"	RE-QUEST LAN-DING	Intercepting aircraft assists intercepted aircraft.
4	I request radio communications on 130.0 MHz or 278.0 MHz. (Initial contact is established on 121.5 MHz or 243.0 MHz.)	Day and Night - If 121.5 MHz and 243.0 MHz are inoperative, aircraft continuously alternates one long with one short flash of navigation lights while rocking wings.	"RADIO CONTACT"	RA-DI-O CON-TAC	Acknowledge requesting aircraft, ship, or air traffic control or monitoring facility with phrase "RADIO CONTACT." After contact is made, tune to 130.0 MHz or 278.0 MHz.
5	My aircraft requests radio contact with your ship on 121.5 MHz or 243.0 MHz.	Day and Night - Aircraft circling the ship, in a left hand turn, at a safe distance and altitude until radio contact is established.	"RADIO CONTACT"	RA-DI-O CON-TAC	The aircraft and ship establish radio contact by exchanging the phrase "RADIO CONTACT"; then both shall switch to 130.0 MHz or 278.0 MHz, as appropriate, for further radio communication.
6	I am experiencing a dangerous level of interference with my command and control network. (Transmit PHRASE on contact frequency.)	None	"STOP INTERFERENCE"	STOP IN-TER-FER-ENCE	Investigate the circumstances and, as appropriate, terminate any activities which may be causing the dangerous interference.
7	My planned use of a laser may create danger in this area. (Transmit PHRASE on contact frequency.)	None	"LASER DANGER"	LAS-ER DAN-GER	Take appropriate measures to prevent harm to personnel or damage to equipment.
8	I am experiencing a dangerous level of laser radiation. (Transmit PHRASE on contact frequency.)	None	"STOP LASER"	STOP LA-SER	Investigate the circumstances and, as appropriate, terminate any use of a laser that could cause harm to personnel or damage to equipment.

ANNEX 2

PROCEDURES FOR THE RESOLUTION OF INCIDENTS RELATED TO ENTERING INTO NATIONAL TERRITORY

This Annex sets forth the procedures for the expeditious resolution, by peaceful means, of any incident which may arise during entry being made by personnel and equipment of the armed forces of one Party into the national territory of the other Party owing to circumstances brought about by force majeure or as a result of unintentional actions, as set forth in Article II, subparagraph 1(a) of this Agreement.

Section I

Entering Into National Territory Owing To Circumstances Brought About By Force Majeure

1. When personnel of the armed forces of one Party are aware that, owing to circumstances brought about by force majeure, they may enter or have entered into the national territory of the other Party, they shall continuously attempt to establish and maintain communications with personnel of the armed forces of the other Party, as provided for in Annex 1 to this Agreement.

2. Upon receiving a communication from personnel of the armed forces of a Party who are aware that they may enter or have entered into the national territory of the other Party, personnel of the armed forces of that other Party shall provide them appropriate

instructions as to subsequent actions, and assistance to the extent of existing capabilities.

3. If personnel and equipment of the armed forces of a Party enter into the national territory of the other Party, the personnel shall take into consideration any instructions received from the personnel of the armed forces of the other Party that are appropriate to the existing circumstances and, subject to the provisions of Article VIII, paragraph 1 of this Agreement, shall either depart the national territory or proceed to a designated location.

4. Personnel of the armed forces of a Party having entered into the national territory of the other Party, upon arrival at the location designated by personnel of the armed forces of that other Party, shall be:

(a) Accorded an opportunity to contact their Defense Attache or consular authorities as soon as possible;

(b) Cared for properly and their equipment protected; and

(c) Assisted in repairing their equipment in order to facilitate their departure from the national territory, and in departing at the earliest opportunity.

Section II

Entering Into National Territory As A Result Of Unintentional Actions Of Personnel

1. When the personnel of the armed forces of one Party establish that personnel and equipment of the armed forces of the other Party may enter into their national territory as a result of unintentional actions or that such an entry has already taken place, the personnel who have made this determination shall continuously attempt to establish and maintain communications with the personnel of the armed forces of that other Party, as provided for in Annex 1 to this Agreement. The purpose of such communications is: to alert personnel of the armed forces of that other Party of the possibility of entry or the fact of entry into national territory; to clarify the reasons for and circumstances of their actions; to recommend that they take measures to prevent such an entry, if possible; or, to render them assistance as appropriate.

2. Personnel of the armed forces of a Party, having been alerted that they may enter into the national territory of the other Party, shall, if possible, undertake measures so that their actions do not result in such an entry.

3. If personnel and equipment of the armed forces of a Party enter into the national territory of the other Party, the personnel shall take into consideration any instructions received from the personnel of the armed forces of the other Party that are

appropriate to the existing circumstances and, subject to the provisions of Article VIII, paragraph 1 of this Agreement, shall either depart the national territory or proceed to a designated location. With respect to personnel and equipment which have arrived at a designated location, the procedures provided for in Section I, paragraph 4 of this Annex shall be applicable.

AGREED STATEMENTS
IN CONNECTION WITH THE AGREEMENT
BETWEEN THE GOVERNMENT OF THE UNITED
STATES OF AMERICA AND THE GOVERNMENT OF
THE UNION OF SOVIET SOCIALIST REPUBLICS ON THE
PREVENTION OF DANGEROUS MILITARY ACTIVITIES

In connection with the Agreement Between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics on the Prevention of Dangerous Military Activities, the Parties have agreed as follows:

First agreed statement. In the case of any entry by personnel and equipment of the armed forces of one Party into the national territory of the other Party owing to circumstances brought about by force majeure or as a result of unintentional actions by such personnel, as set forth in Article II, subparagraph 1(a) of the Agreement Between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics on the Prevention of Dangerous Military Activities, the procedures set forth in Annexes 1 and 2 to this Agreement shall apply regardless of whether that other Party has been made aware of the circumstances of such entry.

Second agreed statement. As indicated in Article VIII of the Agreement Between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics on the Prevention of Dangerous Military Activities, this Agreement does not affect rights of navigation under international law, including the right of warships to exercise innocent passage.

Chairman of the Joint Chiefs of Staff

Chief of the General Staff of the Armed Forces of the USSR